IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1681

J. EDWIN LaVALLEE, Superintendent,
Clinton State Correctional Institution,
Petitioner,

v.

JOHN SUGGS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The District Attorney of New York County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-56a) is reported at 570 F. 2d 1092. The opinion of the Court of Appeals (App. E, *infra*, pp. 61a-68a) on the prior appeal in this case is reported at 523 F. 2d 539.

The four opinions of the District Court are reported as follows: 390 F. Supp. 383 (App. F, *infra*, pp. 69a-84a), 400 F. Supp. 1366 (App. G, *infra*, pp. 85a-88a), 422 F. Supp. 1042 (App. H, *infra*, pp. 89a-97a), and 430 F. Supp. 877 (App. I, *infra*, pp. 98a-113a).

The opinions of the New York State Supreme Court (App. J, *infra*, pp. 114a-117a, and App. K, *infra*, pp. 118a-148a), are not reported.

Jurisdiction

The judgment of the Court of Appeals (App. B, *infra*, pp. 57a-58a) was entered on January 27, 1978. A timely petition for rehearing *in banc* was denied on March 27, 1978 (Apps. C and D, *infra*, pp. 59a and 60a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Is a state prisoner entitled to litigate in a federal habeas corpus proceeding the issue of whether he was competent at the time he pleaded guilty, even though at sentencing, when he was competent and represented by counsel, he personally assured the state court that he had decided to abandon any claim that he was incompetent at plea?

2. Did the federal courts give sufficient weight to the state court's determination, after an evidentiary hearing, that respondent was competent at the time he pleaded guilty?

Statute Involved

The text of 28 U.S.C. Sec. 2254(d) is set forth in Appendix M, *infra*, pp. 155a-156a.

Statement

1. Introduction

In September 1968, respondent John Suggs pleaded guilty in state court, but in October, before he could be sentenced, he was found incompetent and sent to a hospital. In April 1969 he was found competent and returned to state court for sentencing. At that time, he indicated that he might wish to litigate whether he was competent at the time of his plea. To avoid the need for this litigation, the state court simply gave Suggs the opportunity to withdraw his guilty plea. But Suggs, after consultation with his lawyer, changed his mind and asked to be sentenced.

Years later in this habeas corpus proceeding, the courts below ruled, despite Suggs' explicit waiver of the issue, that the state court would have to hold a hearing on Suggs' competency when he pleaded guilty in 1968. Then, after the state court held that hearing, and determined that Suggs was competent, the federal courts ignored that ruling, found Suggs incompetent, and granted habeas corpus relief on the basis of an issue that Suggs explicitly abandoned years earlier.

2. The State Prosecution

On September 13, 1968, John Suggs, represented by counsel, pleaded guilty in New York State Supreme Court (Nunez, J.) to raping one woman, and robbing another woman at knife point. These pleas satisfied three indictments containing a total of 22 counts, the principal charges being rape, sodomy and robbery of three women, robbery of two other women, and felonious assault upon a police officer. After an extensive plea colloquy in which Suggs related in detail facts about his life, and about the rape and the robbery to which he was pleading guilty, his pleas of guilty were accepted. The judge then set a date for sentencing and requested a psychiatric report (Plea Minutes, September 13, 1968, pp. 7-21).*

The psychiatric report, dated October 21, 1968 and signed by Dr. Lubin and Kadar (two psychiatrists at Bellevue Hospital), stated that Suggs was not competent. On November 6, a different state judge (Gold, J.), on motion of Suggs' counsel and upon consent by the People, ordered Suggs committed as incompetent to Matteawan State Hospital, where he remained for five months.

In April 1969, Suggs was found to be competent by Matteawan authorities and was returned to court for further proceedings. His competency as of that time, which is not in dispute, was confirmed, after a further psychiatric examination, by Dr. Messenger, the psychiatrist in charge of the state Supreme Court psychiatric clinic, in a report dated May 20, 1969. (Dr. Messenger noted that he had previously made a similar finding in July 1968; that finding was made shortly before Suggs had pleaded guilty.)

* The opinion of the state Supreme Court (MELIA, J.), App. K, *infra*, at pp. 124a-133a, quotes the relevant plea colloquy.

At that point, when Suggs was competent and further proceedings could be undertaken, the question arose whether Suggs would move to vacate his guilty pleas on the ground that he was incompetent when he entered those pleas. New counsel was assigned by the Appellate Division, First Department, to represent Suggs (see Sentencing Minutes, June 6, 1969, p. 2, App. L, *infra*, p. 150a*), thereby removing any possibility that a conflict of interest might arise on a motion to withdraw the pleas, which were entered when Suggs was represented by an attorney from the Legal Aid Society.

Suggs' new counsel obtained an adjournment of the sentencing in order to have time to "formalize" an application to withdraw the pleas (see Sentencing Minutes, pp. 2-3, App. L, *infra*, p. 150a). The sentencing judge (SCHWEITZER, J.) was willing to grant Suggs the relief he wanted.** Granting such an application would, of course, have avoided difficult litigation over the issue of competency at plea—litigation which might lead to the necessity of trial years later after appeal and collateral attack.

But Suggs, after consulting further with counsel, changed his mind about withdrawing his guilty pleas. At

* While the sentencing minutes indicate that July 3, 1969 was the sentencing date, the District Attorney's brief to the Appellate Division on appeal from the conviction states that that date is incorrect and that the sentencing actually occurred on June 6, 1969. The date of June 6, 1969 has been accepted as correct in the prior proceedings herein.

** See Opinion of the New York State Supreme Court (SANDIFER, J.), December 6, 1973, p. 2, App. J, *infra*, p. 116a; Opinion of the United States Court of Appeals, January 27, 1978, slip op. p. 1372, App. A, *infra*, p. 50a.

that time, the crimes Suggs was charged with were only about a year old. If he had withdrawn his guilty pleas, he would have faced trial on three indictments, charging him with attacks on five women and assault on a police officer. If convicted, he would have been subject to heavy punishment after the court had heard live testimony from his victims. In these circumstances, Suggs, with the advice of counsel, decided not to go to trial but, instead, to seek a lenient sentence from Justice Schweitzer on the two felony counts to which he had pleaded guilty. In advance of the adjourned sentencing date, Suggs' counsel informed the judge that Suggs had abandoned his plan to withdraw his guilty pleas and that he wanted to accept sentence on the pleas (see Sentencing Minutes, p. 3, App. L, *infra,* pp. 150a-151a).

On June 6, 1969, Suggs was arraigned for sentence. He personally, as well as through counsel, informed the court that, while he believed he was incompetent when his guilty pleas were entered, he had decided that he did not want to withdraw his pleas (Sentencing Minutes, pp. 2-4, App. L, *infra,* pp. 150a-152a). The judge invited Suggs, "so we will have no misunderstanding either at this time or in the future" (*id.* p. 4, App. L, *infra,* p. 151a), to confer again with his attorney about withdrawing his guilty pleas, and to take an adjournment of the sentencing in order to give further consideration to the alternative of withdrawing his pleas. Suggs personally declined this offer. He stated, "I wish to be sentenced today" (*id.* p. 4, App. L, *infra,* p. 152a).

In response to the court's questions, Suggs then personally assured the court that it could assume that "after conferring with [his] lawyer [Suggs] no longer planned to withdraw [his] pleas of guilty" (Sentencing Minutes, p. 4, App. L. *infra,* p. 152a). Suggs twice stated that there was no reason why judgment should not be pronounced against him on his guilty pleas to the rape and robbery charges (*id.* pp. 3, 4, App. L, *infra,* pp. 151a, 152a). His counsel, stating that Suggs "is throwing himself on the mercy of the Court" (*id.* p. 5, App. L, *infra,* p 152a), then made a plea for leniency based on Suggs background.

Suggs was given an indeterminate sentence of fifteen years, with a minimum term of five years (Sentencing Minutes, pp. 7-8, App. L, *infra,* p. 154a), which Suggs is presently serving.* Suggs appealed, contending that the sentencing court *sua sponte* should have ordered a hearing into his competency at the time of sentencing.** The judgment of conviction was affirmed without opinion on October 13, 1970. *People* v. *Suggs,* 35 A.D. 2d 781 (1st Dept. 1970). Leave to appeal to the New York Court of Appeals was denied on November 6, 1970.

3. The Post-Conviction Litigation

Despite Suggs' personal, strategic decision, made after consultation with counsel, to forego his claim of incompetency at plea, and to be sentenced instead, the issue of Suggs' competency at plea has been the subject of massive

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* J. Edwin LaVallee, then Superintendent of Clinton State Correctional Facility, was named as the respondent in the District Court, but he no longer has custody of Suggs, who is presently confined at Greenhaven Correctional Facility. Petitioner is referred to herein as "the State" or "the People."

** The same claim was made in a post-conviction application in state Supreme Court, which was denied on August 18, 1970. No appeal was taken from that denial.

litigation in the courts below. The issue has twice been before the Court of Appeals, and the District Court has written four decisions on the subject and has held an evidentiary hearing.

In addition, the state court, after the District Court had ruled that litigation of this issue was not precluded, held an evidentiary hearing on the issue and wrote a lengthy decision finding that Suggs was competent at the time he pleaded guilty. After the state court determined that Suggs was competent at plea, the District Court declared that decision to be a nullity, stating that it was not the business of the state court to decide the issue of competency but rather merely to take testimony and make certain narrow findings—in short, to act as the District Court's referee.

The Court of Appeals ignored the state court determination in another way—by concluding that the state court's determination was unsupported by the record. The Court of Appeals then proceeded to review the evidence again and in two opinions, 57 pages in all, concluded that Suggs was incompetent on September 13, 1968.

(a) The Initiation of Federal Habeas Proceedings and the Denial of a State Post-conviction Motion

This litigation began when Suggs filed a *pro se* habeas petition in October 1972, claiming, as he had in the state courts, that the sentencing court *sua sponte* should have ordered a hearing into his competency at sentencing. After counsel was assigned, consideration of the case by the District Court was suspended, by stipulation, so that Suggs

could present to the state courts a new contention that the sentencing court did not conduct a colloquy claimed to be required by *Boykin* v. *Alabama*, 395 U.S. 238, decided on June 2, 1969, four days before Suggs was sentenced.

The state Supreme Court (Sandifer, J.) rejected Suggs' new claim, stating that a fair reading of the sentencing minutes showed that:

> the court had afforded defendant's counsel an opportunity to familiarize himself with his client's desire to withdraw his previously entered guilty pleas, and that the defendant at a time when his competency ha[d] been attested to by qualified psychiatrists * * * categorically indicated that he "wanted to accept the sentence in this case" * * *; and in addition * * * that the defendant was afforded the opportunity to *withdraw* his previously entered pleas and not merely "to move to set (them) aside" * * * (Opinion of the New York State Supreme Court, December 6, 1973, p. 2, App. J, *infra*, p. 116a; emphasis in original).

Leave to appeal Justice Sandifer's decision was denied on March 5, 1974.

In 1975, the District Court granted Suggs habeas relief. Unaware of Dr. Messenger's pre-plea report of July 1968 indicating that Suggs was then competent (Dr. Messenger's reports were missing at the time of the District Court's first decision), the District Court ruled, without holding a hearing, that Suggs was incompetent at the time of his plea. To support its conclusion, the District Court noted the post-plea psychiatric report of October 21, 1968 that Suggs was incompetent, the subsequent commitment of Suggs as incompetent, and certain statements by Suggs

during the plea colloquy which the District Court termed "bizarre" (Opinion of February 25, 1975, pp. 5, 10 and 18-19, App. F, *infra*, pp. 72a, 76a, and 83a-84a).

Relying on *Boykin* v. *Alabama*, *supra*, the District Court rejected the State's position that litigation of Suggs' competence at plea was foreclosed by Suggs' decision, prior to sentencing in 1969, when he was competent and advised by counsel, to abandon his claim of incompetency and instead to be sentenced. (Opinion of February 25, 1975, pp. 10-15, App. F, *infra*, pp. 76a-80a.)*

(b) The Discovery of Dr. Messenger's Reports and the Remand for an Evidentiary Hearing

During the pendency of the State's appeal to the federal Court of Appeals, the attorney then representing the State discovered in the archives of the state court psychiatric clinic copies of Dr. Messenger's reports of July 23, 1968, and May 20, 1969. The Court of Appeals, in its first decision in this case, without reaching the State's contention that the litigation of the competency issue was precluded, remanded the case for an evidentiary hearing, stating:

> "We believe that the report dated July 23, 1968 [7 weeks before Suggs pleaded guilty] may well be of critical importance to the determination of Suggs' competence at the time of his pleas. In reporting that Suggs was not psychotic it flatly contradicts the Lubin-Kedar (sic) report of October 21, 1968 made three months later. The two reports raise an issue of fact as to Suggs' competence when he pleaded guilty on September 13, 1968." (Opinion of August 7, 1975, slip op. p. 5451, App. E, *infra*, p. 67a).

* The District Court also rejected Suggs' claim, advanced in his initial, *pro se*, application, that the sentencing judge *sua sponte* was required to hold a hearing on Suggs' competency at sentencing (Opinion of February 25, 1975, pp. 16-17, App. F, *infra*, p. 81a).

The Court of Appeals left it to the District Court to decide whether the hearing should be held in the state court or the District Court (*id.*, slip op. pp. 5451-52, App. L, *infra*, p. 68a).

In its first decision after the remand, the District Court decided that the evidentiary hearing should be held in the state court. The District Court suggested witnesses to be called at the hearing (state court judges and Assistants Attorney General), in addition to those suggested by the Court of Appeals, and the District Court added, "Of course, the parties may wish to call other witnesses." (Memorandum Opinion of September 2, 1975, p. 4, App. G, *infra*, p. 87a). The District Court urged the parties to present all available evidence to the state court, stating that it would be "a travesty" if material facts were omitted and that "it is heart-sickening for all courts to be faced with 'newly discovered evidence' after a full and fair hearing, particularly where the evidence apparently could have been obtained before the hearing." (*id.*, p. 3 and n., App. G, *infra*, p. 87a and n.).

(c) The State Evidentiary Hearing and Decision

On November 17 and December 1, 1975, the state Supreme Court, New York County (MELIA, J.) held a hearing on the issue of Suggs' competency at plea. At this hearing, extensive testimony was given by the defense attorney, judge and prosecutor at the plea, and by the three psychiatrists who had examined Suggs shortly before and after the

plea. However, the witnesses had considerable difficulty recalling events which had taken place seven years earlier, and much of their testimony consisted of explanations of their reports and files, based on their customary practice.

In brief, the experienced attorney who was Suggs' counsel at the plea, testified that he was fully able to communicate with Suggs at the plea and considered him cooperative and competent (St. Tr. 131-133, 139-140).* The prosecutor at the plea testified that there was nothing during the plea colloquy that indicated to him that Suggs was incompetent (St. Tr. 151, 163). The judge who accepted the plea testified, by stipulation, on the basis of his "vague" recollection of the plea, that he had ordered a psychiatric examination of Suggs "for all purposes," not just for the purpose of sentencing (Suggs' Exh. B at the state and federal hearings).

Dr. Messenger testified that he considered Suggs to be competent when he examined Suggs in July 1968. Dr. Messenger found Suggs to be a sociopathic personality who knew what he was doing and was able to cooperate when he wanted to do so.

Dr. Martin Lubin, the author of the post-plea psychiatric report of October 21, 1968, was called by Suggs. He testified that he considered Suggs to be incompetent on October 21, 1968 (five weeks after the plea). But, Dr. Lubin considered Suggs to be "somebody who is certainly really competent most of the time" (St. Tr. 95). When he exam-

* References indicated by "St.Tr." are to the transcript of the hearing held in the state court on November 17 and December 1, 1975, which was marked as Court Exhibit Z in the hearing held by the District Court in January 1977.

ined Suggs on September 19, 1968, six days after the plea, Dr. Lubin testified, Suggs might have been a "borderline case of incompetency" (St. Tr. 49).* Dr. Lubin stated that Suggs "might well have been competent in September" (St. Tr. 69-70) when he pleaded guilty, but that after the guilty plea, Suggs' mental condition may have deteriorated because he was sent to the Bellevue prison ward, which could be a shock to a "young fellow" like Suggs (St. Tr. 79). Dr. Lubia also stated that Suggs may have been feigning incompetency in an attempt to evade the consequences of having pleaded guilty (St. Tr. 66-67, 82-95).

Dr. Kadar, who co-signed the report of October 21, 1968, testified that he rarely examined criminal defendants and was called in to help Dr. Lubin "jointly interview" Suggs because the Bellevue prison ward was overloaded (Kadar: St. Tr. 9, 10, 26-27; Lubin: St. Tr. 81-82). Dr. Kadar did not meet Suggs before or after the October 21 interview, and made no reference to information in Suggs' hospital records (Kadar: St. Tr. 11-13, 20, 27, 33).

The state court determined that Suggs was competent when he pleaded guilty. Evaluating the conflicting psychiatric testimony, the court found that Dr. Messenger, whose testimony supported the State's position, had given "cogent and compelling testimony" which was "highly credible and reliable" (Opinion of December 3, 1975, p. 28, App. K, *infra*, p. 142a). "The testimony of Drs. Kadar and Lubin was not as impressive" (*id.*).

However, the court relied more heavily on the evidence of Suggs' actual behavior at the plea as shown by the plea

* On September 19, 1968, Dr. Lubin tentatively diagnosed Suggs as "schizoid with paranoid features," a diagnosis of personality disorder which was similar to Dr. Messenger's diagnosis of July 1968.

colloquy itself and by the testimony of witnesses who had dealt with Suggs during the course of that proceeding. The state court found that Suggs' responses to extensive questioning during the plea colloquy were "responsive, relevant and illuminating" concerning his life history as well as the details of his crimes (*id.*, p. 29, App. K, *infra*, p. 143a). Suggs was represented by an "extremely able and experienced attorney" (*id.*, p. 18, App. K, *infra*, p. 135a) who "found no reason, either prior to or during plea, to lead him to believe that the defendant was incompetent (*id.*, p. 29, App. K, *infra*, p. 143a). The prosecutor did not find any reason to question Suggs' competency. And the judge who accepted the plea "did not then believe the defendant to be incompetent else he would not have accepted the plea" (*id.*). While Justice Nunez had ordered a psychiatric report "for all purposes" after he accepted the guilty pleas, the state court noted that it was a regular practice of the state court in 1968 to order a psychiatric report as an aid in sentencing (*id.* pp. 5, 19, App. K, *infra*, pp. 122a-123a, 135a).

Finally, the state court noted that Suggs had a great deal to gain by pleading guilty rather than going to trial. On September 13, 1968, "competent judgment dictate[d] the acceptance of the best offer in order to avoid convictions on multiple counts [embracing many unrelated crimes] with the added impact of the court having heard live testimony of victims" (*id.*, p. 18, App. K, *infra*, p. 135a).

Having ruled on the issue of Suggs' competency at plea, as required by the federal courts, the state court also held that, at the sentencing in June 1969, Suggs had waived the right to litigate the question of his competence at plea and

had ratified his guilty pleas. In June 1969, when Suggs was given the option of withdrawing his guilty pleas, Suggs "still opted for the imposition of sentence on the plea rather than face the possibility of consecutive sentences on multiple B felony counts" (*id.*, p. 35, App. K, *infra*, p. 148a). Accordingly, the state court ruled that Suggs should have been foreclosed from litigating the issue of his competence at plea.

(d) The District Court's Decision to Disregard the State Court's Determination of the Issue of Competency

Although Suggs could have sought leave to appeal the state court's decision, he did not do so. Instead, over the State's objection, he returned to the District Court, which rejected the State's contention that, in order to exhaust his state court remedies, Suggs had to appeal the determination of competency in the state appellate courts.

Indeed, the District Court declared that it would entirely disregard the state court's determination of the issue of competency. The principal ground stated in support of this ruling was that the District Court had not wanted the state court to hold a hearing and decide the issue of competency. Instead, according to the District Court, its request that the state court hold a hearing had been a "remand" for the "mere taking of testimony" and the making of "narrow" findings concerning knowledge of the existence of the Messenger reports (Opinion of Nov. 16, 1976, p. 7, App. H, *infra*, p. 94a). According to the District Court, the state court's determination that Suggs was competent "went far beyond this narrow matter referred for resolution." (*Id.*) On this theory, the District Court

proceeded to consider the issue of Suggs' competency at plea as if the state court's determination of that issue had never been made.*

The District Court held a brief hearing in January 1977, at which the bulk of the evidence consisted of the transcript and exhibits from the state hearing. There was also introduced by Suggs some additional testimony by the defense attorney at plea, and various records, which were in the hands of Suggs' counsel at the state evidentiary hearing or were available to him at that hearing.**

* The District Court's alternative rationale was that there was a "glaring omission" from the state court hearing because there had been no testimony by Justice Gold. Opinion of November 16, 1978, pp. 9-10, App. H, *infra*, p. 96a. However, Justice Gold's only connection with the case was that he had presided at a very brief proceeding on November 6, 1968, at which, on the basis of the Lubin-Kadar report of October 21, 1968, and upon consent and without a hearing, Suggs was ordered committed as incompetent. It was obviously unlikely that Justice Gold would be able to recall anything about Suggs which would significantly add to what appeared in the minutes of that proceeding; these minutes were part of the record of the state court proceedings and contained no discussion of Suggs' mental condition. When Justice Gold testified, by stipulation, at the hearing ordered by the District Court, the sum total of his testimony was that he recalled nothing of Suggs or of any proceeding concerning Suggs (Suggs' Exh. G. at the District Court's hearing).

** Suggs introduced at the hearing in the District Court (Suggs' Exh. L) the Legal Aid Society's file on Suggs which Suggs' counsel obtained at the state court hearing and used at that hearing to question the Legal Aid attorney who represented Suggs at the plea (see St. Tr. 135-136, 182-183, 189, 194-196).

The records of Suggs' commitment to Matteawan from November 15, 1968 (two months after his guilty plea) until April 10, 1969 (Suggs' Exh. F at the District Court's hearing) had been subpoenaed by Suggs for the state court hearing. (The Matteawan records contained copies of Suggs' records at Rockland State Hospital from 1963, when Suggs was twelve years old.) These records were used

(footnote continued on next page)

At the hearing held by the District Court, in contrast to the state court hearing, none of the psychiatrists who had examined Suggs shortly before and after his plea in 1968 testified. Dr. Messenger, whose impressive testimony had played an important part in the state court's determination that Suggs was competent at plea, was no longer available; he had retired to Barbados (Minutes of January 17, 1977, p. 40). Suggs did not call either Dr. Lubin or Dr. Kadar; his counsel stated that Dr. Lubin had nothing to add to his testimony at the state court hearing (*id.*). Instead, Suggs arranged an interview with a psychiatrist, Dr. Augustus Kinzel, who had had no contact with Suggs prior to January 1977. This interview, which lasted for one hour, was conducted solely for the purpose of furnishing a basis for Dr. Kinzel to testify about Suggs' competence at the plea eight years earlier (Minutes of January 21, 1977, pp. 12, 57). At this interview, Suggs told Dr. Kinzel that he had "lost his memory" for the entire year 1968 (*id.*, pp.

at the state hearing by Suggs in the questioning of Dr. Lubin (see St. Tr. 95). Suggs chose not to introduce these records into evidence at the state court hearing, perhaps because these records suggested that Suggs may have feigned incompetency when he was examined by Dr. Lubin following his guilty plea (see Suggs' Exh. F, pp. 3, 5 and 9). Without introducing these records, Suggs' counsel nevertheless informed the State court that Suggs had been considered incompetent while at Matteawan and had later been returned as competent (see St. Tr. 95). In addition, the state court had before it as part of the state court file a report from the Superintendent of Matteawan noting that Suggs had been diagnosed there as psychotic, and that he had been treated there and returned as improved.

Suggs also introduced at the District Court hearing (Suggs' Exhs. J and K) correction records of Suggs' incarceration in 1968. These records contained a possible suicide note by Suggs about August 1, 1968 and also showed that Suggs' behavior was normal when observed at half-hourly intervals for a week thereafter (see Minutes of January 17, 1977, pp. 14-15, 17, 20-21, 25-26). These records of events in 1968 could have been but were not subpoenaed by Suggs at the state court hearing.

14-18, 64-65). Relying largely on this story and having reviewed Suggs' medical records, Dr. Kinzel testified that Suggs was "probably incompetent" eight years earlier when he pleaded guilty (*id.*, p. 11).*

The District Court relying heavily on Dr. Kinzel's testimony, and continuing to ignore completely the determination of the state court which had heard all the important witnesses who had observed Suggs at or near the time of his plea, concluded that Suggs was incompetent when he pleaded guilty (Opinion of April 5, 1977, pp. 18-19, App. I, *infra,* pp. 112a-113a). The District Court vacated Suggs' conviction and directed that a writ of habeas corpus issue in sixty days unless Suggs is permitted to replead in state court within that time. A stay was granted by the District Court pending the State's appeal.

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* Suggs did not testify in any proceeding to support the story he told Dr. Kinzel in 1977 about "losing his memory" in 1968. This story was inconsistent with the plea colloquy itself which showed Suggs' detailed recollection of the crimes he committed in the spring of 1968, and of other events in his life at that time. Suggs' story was also inconsistent with records made by several psychiatrists who examined Suggs in 1968 and 1969; these records showed that in 1968 and afterwards, Suggs recalled numerous events, including his crimes (see St. Tr. 74 [Lubin], 110 [Messenger]; Suggs' Exh. F at the District Court's hearing, last and next-to-last pages).

Dr. Kinzel conceded that his opinion that Suggs was in a state of "psychotic amnesia" throughout 1968 was inconsistent with the testimony of all three psychiatrists who had examined Suggs in 1968 that Suggs' mental condition fluctuated so that he could have been competent at some times and not at others (Minutes of January 21, 1977, pp. 17-18, 68-70). Dr. Kinzel also claimed, at a time when Dr. Messenger had retired and was unavailable to respond, that Dr. Messenger's personal examination of Suggs in 1968 had not been a proper psychiatric examination (*id.*, pp. 28-29).

(e) The Court of Appeals Second Decision

Appealing from the District Court's second grant of habeas corpus relief, the State presented two contentions. First, the State contended that when the state court held a post-conviction hearing on the issue of competency, the court was acting as the judicial branch of an independent sovereign. The District Court had not asked the state court to act as a referee for the District Court, and had no power to do so. The state court's determination of the issue of competency could not be treated as a nullity, which is what the District Court stated it was doing.

The Court of Appeals avoided this issue, but, like the District Court, decided to ignore the state court's findings. The Court of Appeals, relying heavily on Dr. Kinzel's testimony and other evidence which Suggs chose not to present to the state court (see above, pp. 16-18, and nn.), ruled that the determination made by the state court was not supported by the record and that material facts had not been adequately developed at the state hearing, 28 U.S.C. Sec. 2254(d)(3) and (8) (Opinion of January 27, 1978, slip op. pp. 1361-69, App. A, *infra,* pp. 39a-47a).

Second, the State contended that Suggs had waived the right to litigate in a federal habeas corpus proceeding the issue of his competency at plea. The Court of Appeals rejected this argument, concluding that Suggs could litigate the question of his competency at plea in connection with a claim, under *Boykin* v. *Alabama,* 395 U.S. 238 (1969), that there was no adequate plea colloquy. In effect, the Court of Appeals ruled that rights under *Boykin,* are not waivable.

The central premise of Judge Oakes' opinion for the panel was that, *if* Suggs was not competent at the plea, then the colloquy which took place at the time of the plea was a nullity and could not meet the requirement of *Boykin*. The later colloquy at the time of the sentencing (four days after *Boykin* was decided) could not satisfy *Boykin*, Judge Oakes wrote, because at that time there was no inquiry into the voluntariness or the factual basis of the earlier plea. Thus, Judge Oakes concluded, if Suggs was not competent at plea, there was no adequate colloquy at a time when he was competent. And, the claim under *Boykin* that there was no adequate colloquy was not waived by Suggs' failure to raise that claim at sentencing. (Opinion of January 27, 1978, slip op. pp. 1369-76, App. A, *infra*, pp. 47a-54a).

Reasons for Granting the Writ

1. This case presents an important question concerning the availability of federal habeas corpus. May a state prisoner litigate an issue which, after consultation with counsel, he has consciously, explicitly, for good and sufficient strategic reasons, abondoned in state court? The Court of Appeals ruled that the principles of waiver and "deliberate bypass" embodied in *Fay* v. *Noia*, 372 U.S. 391 (1963), and most recently broadened in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), were somehow overridden by the principles enunciated in *Boykin* v. *Alabama*, *supra*.

The Court of Appeals did not undertake the important and difficult task of resolving the conflicting principles of *Fay* and *Boykin*. Rather, the court simply ignored the principles of waiver and "deliberate bypass" urged by

the State. The Court, reasoned that *if* Suggs was incompetent at plea, then the plea colloquy was a nullity, and there was no time at which the colloquy required by *Boykin* took place. The initial step in this reasoning was the assumption that the issue of Suggs' competency at plea was open for determination in a federal habeas corpus proceeding. But, Suggs' incompetence *vel non* at plea is the very issue which Suggs expressly refused to present to the state court in 1969. It is that issue which, under principles of waiver and "deliberate bypass," should never have been the subject of litigation in a habeas corpus proceeding.

This is a classic case of waiver. After Suggs was found competent and was returned to court, he consulted with his new lawyer. The question was raised whether Suggs wanted to litigate the issue of his competence at plea. The judge indicated that if Suggs wanted to pursue this claim, he would be permitted to withdraw his guilty pleas. Suggs, however, decided that he did not want to have his pleas vacated. Instead, he chose to be sentenced on those pleas. He personally informed the judge of this decision and explicitly assured the judge that he would not pursue the claim of incompetency at plea.

Suggs' decision was strategic as well as deliberate. In June 1969, the rapes, robberies and other felonies for which he had been indicated were only about a year old. If he had withdrawn his guilty pleas, he would have faced the prospect of trial for all these crimes. If convicted, he would have been subject to heavy punishment after the court had heard live testimony from his victims concerning their horrible ordeals. Suggs, with advice of counsel, chose

the alternative of pleading for a lenient sentence on the two felony counts to which he had pleaded guilty.

This is a classic case of waiver in another sense because it illustrates why the principles of waiver and "deliberate bypass" are so important. If Suggs had claimed in 1969 that he was incompetent at plea, there would have been no need to litigate the issue of his competency. He would have been permitted to withdraw his guilty pleas. Years later, in post-conviction proceedings, it has been exceedingly difficult to resolve the issue with any degree of confidence. Reports have been lost and re-discovered. Doctors have become unavailable. The recollections of the judge, defense attorney and prosecutor who participated in the plea, and of the psychiatrists who examined Suggs shortly before and after plea, have faded. In these circumstances, the courts below, believing that they were required by *Boykin* v. *Alabama, supra*, to entertain such litigation, chose to rely on the opinion of a psychiatrist who examined Suggs for one hour eight years after the guilty pleas.

Attempting to determine an issue as difficult as competency so many years later requires an enormous expenditure of resources by the overburdened federal courts. Here, there were two decisions by the Court of Appeals, four decisions by the District Court, and an evidentiary hearing as well. The ruling of the Court of Appeals, if permitted to stand, will burden the federal courts with such litigation by habeas petitioners long after they assured the state courts that they had abandoned such litigation, and long after the issue may be accurately determined.

Furthermore, the nature of the relief Suggs will receive in a federal habeas corpus proceeding, if he is permitted to litigate the issue of competency, has been drastically altered by the passage of time. Years later, putting Suggs on trial would be virtually impossible. In these circumstances, vacating his guilty pleas would very likely lead to dismissal of the charges, freeing Suggs as if he were an innocent man. Even if trial were possible, to require the victims of these brutal crimes to relive their experiences on the witness stand after so many years should be a consideration of some weight.

Finally, the ruling of the courts below constitutes a substantial intrusion into the processes of the state courts. Years ago, Suggs solemnly assured the state court that he had abandoned any claim that he was incompetent at plea. For a federal court to permit that issue to be litigated despite that assurance would be to encourage "sand bagging" on the part of defendants and their lawyers. If federal habeas relief is available in such circumstances, defendants may take their chances on light sentencing in the state court and, if that gamble does not pay off, attack their guilty pleas in a federal habeas proceeding some years later when the chances of their being convicted after trial have decreased markedly. *Cf. Wainwright* v. *Sykes, supra*, 434 U.S. at 89.

2. This case also presents an important question concerning the proper weight to be given by a federal court to a factual determination made by a state court. If state court's determinations are to be set aside, as here, merely because the federal courts take a different view of the evidence, then there will be serious intrusions upon the

principles of federalism and comity. In addition, state prisoners will be encouraged to demand hearings in federal court in the hopes that the federal courts will simply take a different view of the evidence.

In this case, the District Court explicitly disregarded the state court's determination. According to the District Court, because the state court was only supposed to take evidence to resolve certain narrow matters, the District Court could treat as a nullity the state court's determination that Suggs was competent at plea. The state court, however, is not a referee for the federal district court. When the state court, a court of coordinate jurisdiction, holds a hearing and decides the factual issue in the case, that determination must be accorded respect and must be given great weight. *Townsend* v. *Sain*, 372 U.S. 293 (1963); *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973); 28 U.S.C. Sec. 2254(d).

The Court of Appeals ignored the state court's determination for a different reason. That court concluded that the introduction of some additional evidence at the District Court's hearing justified disregarding the state court's determination. The evidence referred to by the Court of Appeals was in the hands of Suggs' counsel, or available to him, at the state court hearing (see above, pp. 16-18, and nn.). The Court of Appeals also suggested that the "restraint principles" of 28 U.S.C. Sec. 2254(d) might somehow be weakened with respect to factual determinations made in a state postconviction proceeding after a district court had had the power to determine a factual issue and had refrained from doing so (*id.*, slip op. p. 1364, App. A, *infra*, p. 42a).

The determination by the state court, which heard all the important witnesses, may not have been the only permissible one. But, the state court's determination was certainly reasonable in view of the testimony of Suggs' lawyer at the plea that Suggs was cooperative and competent, the prosecutor's testimony that Suggs did not behave in an unusual manner, Dr. Messenger's testimony that Suggs was competent in July 1968, and the plea colloquy itself which showed Suggs' understanding of the proceedings against him and his detailed recollection of his crimes. The federal courts should not be free to completely disregard such a determination.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

May, 1978

Appendices

Appendix A

Opinion of the Court of Appeals
January 27, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 137—September Term, 1977.

(Argued September 2, 1977 Decided January 27, 1978.)

Docket No. 77-2053

JOHN SUGGS,

Appellee,

v.

J. EDWIN LAVALLEE, Superintendent,
Clinton State Correctional Institution,

Appellant.

Before:

KAUFMAN, *Chief Judge,*
OAKES and MESKILL, *Circuit Judges.*

Decision of Judge Kevin T. Duffy, United States District Court for the Southern District of New York, vacating state conviction and granting writ of habeas corpus is affirmed on the basis that prisoner was never afforded a *Boykin* v. *Alabama,* 395 U.S. 238 (1969), colloquy at a time when he was competent to stand trial. The State's waiver and ratification arguments are rejected.

HENRY J. STEINGLASS, Assistant District Attorney, New York County (Robert M. Morgenthau, District Attorney, New York County,

Peter L. Zimroth, Assistant District Attorney, of counsel), *for Appellant.*

Judson A. Parson, Jr., New York, N.Y. (Christopher B. Kende, New York, N.Y., of counsel), *for Appellee.*

Oakes, *Circuit Judge:*

This case presents an all too familiar pattern of breakdown—of societal, institutional, medical and legal failure adequately to cope with a person. Perhaps inability to solve an insoluble problem is a better description, since the intentions of those attempting to cope—psychiatrists, psychologists, correction officers, judges and lawyers—have in no case been untoward.

The John Suggses of life begin with an utterly crippling home environment. Early on they exhibit signs of unusual, bizarre and even destructive behavior, often the result of traumatic experiences. Society, with humanitarian motivation, institutionalizes them, ostensibly to protect itself or them, more probably because no alternative exists. The depth of the mental/emotional problem proves too great, the number of Suggses too large, the resources for positive assistance too few. When released into society, criminal behavior is probable, not merely possible. A rape, a robbery, a mugging or worse ensues.

The legal system then assumes jurisdiction over the problem. Somehow the rights of the individual must be protected, while the danger to society is removed. Questions of competency to stand trial and of criminal responsibility arise. The psychiatric experts and the judges who must rule disagree; both psychiatry and law are insufficiently advanced to attain the scientific precision necessary to resolve these questions. Yet decisions have to be made.

After a period of years the case is just as insoluble as it was in the beginning.

The posture of John Suggs' case before us may be rather briefly stated. Its history is more complex. Its psychiatric background is extensive. Its resolution is, as one might suspect, hardly free from doubt.

I. Posture

The People of the State of New York appeal from a judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, Judge, vacating Suggs' convictions for rape and robbery and granting a writ of habeas corpus to issue within sixty days unless Suggs is permitted to replead in state court[1] on the basis that Suggs was never afforded the colloquy on voluntariness mandated by *Boykin* v. *Alabama*, 395 U.S. 238 (1969), at a time when he was competent to stand trial. 430 F. Supp. 877, 884 (S.D.N.Y. 1977); 390 F. Supp. 383 (S.D.N.Y.), *vacated on other grounds*, 523 F.2d 539 (2d Cir. 1975). The judgment was rendered after an evidentiary hearing in which Judge Duffy found Suggs incompetent at the time of his guilty pleas. 430 F. Supp. 877.

To consider the State's contentions adequately requires a detailed recounting of both the ten years of litigation preceding this appeal and the facts underlying this protracted judicial history. At the risk of some repetition, we first provide a skeletal, chronological summary of the prior state and federal proceedings with the goal of minimizing the confusion wrought by the complex and lengthy record.

After Suggs' arrest, he was psychiatrically examined by Dr. Emanuel Messinger in July, 1968, to aid in determining whether Suggs would be afforded Youthful Offender

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1 A stay was granted pending this appeal.

treatment. This report, which arguably found Suggs competent to stand trial, was lost. Thus, as subsequently revealed, none of the state judges who considered this case was aware of these psychiatric conclusions.

On September 13, 1968, Justice Emilio Nunez of the State Supreme Court, New York County, accepted Suggs' pleas of guilty to one count of rape and one count of robbery after a discussion with Suggs which evidently statisfied the judge of the pleas' voluntariness. As the colloquy continued, however, appellee's unusual responses prompted the court, sua sponte, to order a psychiatric examination. However, the court did not reject or otherwise mention the pleas of guilty accepted immediately preceding the commitment order. The parties differ on whether Justice Nunez ordered the examination solely for purposes of sentencing, or to determine competency as well.

A second group of psychiatric examinations performed by Drs. Martin Lubin and Laszlo Kadar between September 19 and October 21, 1968, at Bellevue Psychiatric Hospital (Bellevue), pursuant to Justice Nunez' order, found Suggs incompetent to stand trial. On the basis of these reports, and without knowledge of the Messinger report, appellee was determined incompetent by Justice Samuel Gold on November 6, 1968, and was committed until competent to Matteawan State Hospital (Matteawan) on November 15, 1968.

When the authorities determined that appellee could stand trial, he was returned to Justice Mitchell Schweitzer, who required a second examination by Dr. Messinger, performed in May, 1969. This report substantially corroborated the earlier Messinger diagnosis and was also misplaced after the proceeding before Justice Schweitzer. Justice Schweitzer then certified Suggs as competent, and sentenced him on June 6, 1969, on the basis of his previous

pleas of guilty before Justice Nunez without inquiring into the validity of or factual basis for the earlier pleas. The sentence was imposed after Suggs personally informed the court that while he did not wish to withdraw his previous pleas of guilty, and wished to accept sentence on those pleas, he felt that he had been incompetent when he originally pleaded guilty. A series of state appeals and state collateral attacks followed, which are not particularly important in resolving this appeal.

On February 25, 1975, Judge Duffy granted appellee's petition for a writ of habeas corpus without an evidentiary hearing. He concluded that Suggs was denied due process of law because the state courts had never conducted a full and complete inquiry into voluntariness, as required by *Boykin* v. *Alabama, supra,* decided four days prior to the sentencing hearing before Justice Schweitzer. The district court first found Suggs incompetent when he entered his pleas of guilty on September 13, 1968, as judicially determined by Justice Gold. Thus the pleas were void under *McCarthy* v. *United States,* 394 U.S. 459 (1969), and *Pate* v. *Robinson,* 383 U.S. 375 (1966). It then held that the 1969 sentencing by Justice Schweitzer was not a valid substitute for a guilty plea because no *Boykin* colloquy had been conducted at this later time. 390 F. Supp. 383.

During the pendency of the State's appeal from Judge Duffy's decision, the two Messinger reports were discovered. We vacated Judge Duffy's order and remanded the case for an evidentiary hearing by either the state court or the district court on Suggs' competence at the time the guilty pleas were entered, in light of the newly discovered Messinger reports which contradicted the Lubin/Kadar reports. We left to Judge Duffy's discretion whether he or the state court would conduct the hearing. *United*

States ex rel. Suggs v. *LaVallee*, 523 F.2d 539, 543 (2d Cir. 1975).

On remand, Judge Duffy ordered that a factual hearing be held in state court for the convenience of the state judges who would be required to testify. 400 F. Supp. 1366 (S.D.N.Y. 1975). The scope of this reference is in dispute.

A full-blown hearing on Suggs' competency was conducted by Justice Anthony Melia, in the Supreme Court, New York County, on November 17 and December 1, 1975. He found that Suggs was competent when he entered his pleas and that in any case, contrary to Judge Duffy's prior decision, 390 F. Supp. 283, Suggs had ratified the pleas at sentencing. *People* v. *Suggs*, Nos. 3063/68, 3063A/68, 2251/68 (N.Y. County Sup. Ct., filed Dec. 3, 1975).

Judge Duffy then set aside Justice Melia's findings and ordered a federal hearing on the issue of competency. 422 F. Supp. 1042 (S.D.N.Y. 1976). He again found Suggs incompetent on September 13, 1968, and followed his earlier opinion, 390 F. Supp. 383, granting the writ, 430 F. Supp. 877.

This appeal followed.

The State contends first that Judge Duffy was bound by, or erred in not following, the decision of Justice Melia holding Suggs competent at the time of his guilty plea. The State contends second that, if Suggs was incompetent at the time of his September 13, 1968, plea, he abandoned or waived the incompetency claim at the sentencing proceeding when he was competent and is therefore precluded from raising it in the habeas corpus proceedings under *Wainwright* v. *Sykes*, 45 U.S.L.W. 4807 (U.S. June 23, 1977).[2] Finally, the State argues that appellee ratified the

2 The State argues further that even under the "deliberate by-pass" language of *Fay* v. *Noia*, 372 U.S. 391, 439 (1963), the claim of incompetency at plea was abandoned.

pleas at the time of sentencing by not withdrawing them when given the opportunity.[3]

The State does not contend that, if its arguments are insufficient, Judge Duffy's factual findings are clearly erroneous. However, in the course of addressing the State's arguments, which we believe cannot prevail, the validity of the district court's findings and decisions will become manifest. We begin with an in-depth recitation of the facts.

II. History of the Case

A. *Suggs' Preindictment History*

1. Early Childhood History.

John Suggs evidently was born in New York in June of 1951, is black and has lived in New York City all of his life. Much of his personal history is unclear in the lengthy but still incomplete record that ten years of legal proceedings have produced.[4] The record vividly reveals an unstable home environment, devoid of parental supervision and attention. From his birth appellee was shuttled back and forth between his mother[5] and his "aunt."[6]

3 This argument was presented to and rejected by Judge Duffy. 390 F. Supp. 383 (S.D.N.Y.), *vacated on other grounds*, 523 F.2d 539 (2d Cir. 1975). While it is unclear whether the State has abandoned the claim at this time, we will nevertheless address the issue.

4 The following facts are stated with qualifications and conditionally. Most of them are drawn from sketchy records based on secondhand information, or facts furnished by Suggs, whose reliability for accurately conveying information is questionable.

5 She came from North Carolina and was unmarried at the time of his birth. She had other children—Suggs usually mentions two but has referred to as many as eight—who evidently were also illegitimate. Little else is known about his mother, except that she died in 1961 and was described by his "aunt" as "a person whose mind was like a child [*sic*]." It appears possible that Suggs' mother lived with his father for a short period of time after Suggs was born.

(Footnotes 5 and 6 continued on following page)

Suggs was an habitual truant from school, usually riding subways or wandering in parks. In early childhood he exhibited unusual behavior. On several occasions he set fire to newspapers in the house, but ordinarily notified the fire department shortly after starting the blaze. His aunt also reported that he set fire to furniture in her home, and that he once killed a parakeet by pulling off the bird's head.

2. Institutionalization.

Suggs was referred to the Wiltwyck School for Boys (Wiltwyck) at the age of ten, originally by the Manhattan Children's Court on a delinquency petition following a burglary incident in which he was implicated. The petition was changed to a neglect petition after investigation uncovered the obvious parental neglect.

His behavior problems continued unabated. When his mother died about a month after his admission, Suggs evidently became obsessed with the idea that the children in his dormitory were responsible for her death. In retribution he set fire to the dormitory, but did so where it would be found and no one would be hurt. On another occasion

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(Footnotes 5 and 6 continued from preceding page)

Parental neglect was apparent from the first. The aunt recalls seeing appellee on the floor of his mother's home eating a loaf of bread. On another occasion, Suggs, at three years of age, was found by the police wandering the streets after his mother sent him to the store to buy some cookies. At the age of three, he fell down a flight of stairs. This incident was followed by a history of headshaking and nocturnal nosebleeding. At the age of four the first joint of his little finger was crushed, apparently in a swing, and had to be amputated. At approximately ten years of age, appellee contracted acute rheumatic fever with carditis.

6 Suggs lived with a friend of his mother's, referred to in the records as both his aunt and guardian, from approximately 1954 until he was admitted to the Wiltwyck School for Boys at ten years of age. While she tried to help appellee, alcoholic and marital problems precluded her from giving Suggs the kind of upbringing expected of even remote foster parents.

he was found packing dirt into the exhaust of a truck used to transport the children with the aim of blowing it up. At some point he became convinced that he too was responsible for his mother's death. While still at Wiltwyck, approximately at the age of eleven, he attempted suicide by drinking mercury from a thermometer. According to the Wiltwyck records as subsequently set forth in the Rockland State Hospital (Rockland) files, Suggs' method of establishing friendship was to engage in assaultive conduct; there were numerous acts of hostility against other student-inmates as well as against teachers. The medical director, aware of the threat Suggs posed to himself and others, and unable to arrest Suggs' delusional thinking, finally suggested institutionalization at Rockland.

Suggs was admitted to Rockland in August of 1963. When he was initially examined by Dr. Katz, a psychiatrist, he appeared to have a normal intellectual level with orientation and memory intact. But Dr. Katz also noted Suggs' long history of auditory and visual hallucinations, his tendency toward obsessive, compulsive thinking with delusional and paranoid aspects and the severe impairment of Suggs' insight and judgment. The initial impression of the psychiatrist was that "[t]here is much of a schizophrenic about this youngster but he is extremely emotionally deprived and now unable to accept any close relationship, although he verbalizes a desire for it." He concluded that Suggs "may be ultimately a schizophrenic."

There was little change in Suggs' condition after admittance. Not long after he arrived at Rockland his ward was changed because he was fearful of attacks by other patients. He was later diagnosed as having "primary behavior disorders in children. Conduct disturbance."

At the age of thirteen, in 1964, he left Rockland for the Thanksgiving holiday but did not return. In January, 1965, he was found in New York City, and after a psychiatric

examination was placed on convalescent status, so that he could reside with his aunt while attending a neighborhood clinic. He was discharged in November, 1965, when it was learned that Suggs was in "Warwick" Training School (Warwick).

Suggs may have been sent to Warwick for having shot or stabbed his aunt's husband. Incidental to this commitment, he was examined in July of 1965, this time at Bellevue, apparently pursuant to a Children's Court order on another neglect petition, and possibly because of his failure to attend the aftercare clinic when placed on convalescent status at Rockland. He was initially diagnosed, despite his "sunken, depressive attitude," as "not psychotic at present," though evidencing a strong tendency in that direction.[7] A later report by a psychologist, Ms. Barron, referred to Suggs as a "powderkeg about ready to explode," with feelings of "inadequacy, helplessness and depression." She accurately predicted that "under severe stress" he would "be unable to institute appropriate limits on his own behavior, and rage reactions are probable." She too felt that while "he functions superficially in a reasonable fashion," he is "at a borderline level of integration, and may regress rather rapidly under repeated tension or additional trauma." Her diagnostic impression was "character disorder with paranoid and borderline features (passive-aggressive-aggressive type)" with "potential for schizophrenia." Because of his emotional instability and deprived

7 The interviewer noted that Suggs was an aggressive, verbal adolescent who superficially "appears quite intact. However, there is a deep underlying sense of hopelessness in the boy. His HX [history] gives him every reason to feel what he does." The diagnostician observed that "the boy is beginning to utilize projective defense [*sic*] which increases [*sic*] rage & serve him no purpose" and that "his thinking can become rather confused," but he as yet did "not see him as a psychotic youngster." The doctor warned, however, that "[t]here is a strong possibility . . . that he may develop into a paranoid schiz. [*sic*] in the future."

home environment, Bellevue recommended another stay at training school.

At this point the already unclear record becomes further muddied. It appears that when Suggs was released from Warwick to his aunt, he attended Charles Evans Hughes High School for four or five months. There his difficulties continued as he apparently "kidnapped" a schoolmate for a period of four hours. The authorities then sent him to Hampton State Training School in April, 1967. The record of his behavior at Hampton and whether he was released or simply escaped is barren, but it is known that he left Hampton in April of 1968, at age sixteen. Ms. Barron's prediction of a "powderkeg" seems to have been quite accurate.

B. *History of Suggs from May, 1968, Through Pleas of Guilty Before Justice Nunez*

1. The Charges and Psychiatric Examination by Dr. Messinger.

On May 6, 1968, Suggs was arrested for feloniously assaulting a patrolman on the City College campus, where appellee may have taught karate.[8] Shortly thereafter he was charged with numerous rapes and robberies allegedly committed in April and May of 1968.[9] Because he was under nineteen years of age—he reached seventeen in June of 1968—appellee was entitled to consideration for youthful offender treatment. The chief probation officer, Mr.

8 Subsequently, Suggs consistently claimed that the patrolman had been abusive to him.

9 One indictment charged Suggs in 18 counts with rape, sodomy, robbery and related crimes committed against three women on April 27, May 22, and May 24, 1968. A second indictment charged him in five counts with robbery and related crimes committed against two women on April 30 and May 28, 1968. Thus, there was a total of 23 counts pending against him.

Reeves, requested a prepleading psychiatric examination,[10] which was a fairly routine practice at that time in youthful offender cases. Suggs was examined first by a psychologist,[11] then by Dr. Messinger, a psychiatrist, at the Supreme Court Psychiatric Clinic on July 17, 1968, to assist the court in deciding whether youthful offender treatment was appropriate.[12]

The psychological report is important since it was the basis for much of the subsequent psychiatric report of Dr. Messinger, the discovery of which caused our court to remand the previous grant of the writ in this case. This report explains that Suggs "answers or not as he happens to feel at the moment, & refuses such tasks as he wishes. Much of the time he was angry and complaining, reciting various grievances, etc. He sat with his back turned to Ex. [examiner] for part of the time." Evidently his "variable cooperation" made for "extreme swings" on the psychological tests which ranged from "defective to superior." The psychologist thought that Suggs had "an intellectual potential well above average, but he has never submitted to the discipline of learning, so that he reads and spells at approximately a third grade level." Despite Suggs' lack of cooperation on most of the Rorschach tests, Suggs "demonstrated that he is able to function very well

10 It is unclear whether the examination was conducted solely with reference to the assault charge or was ordered in light of the subsequent rape and robbery charges as well. In any event, the psychiatric examinations were conducted after the rape and robbery indictments were handed down, and the reports show an awareness of these additional charges.

11 Mr. Reeves informed the director of the psychiatric clinic that Suggs "expressed a great deal of hostility and aggressivity toward authority figures and it would seem that he has many emotional problems." He also noted that Suggs had threatened to kill a police officer during the interview.

12 Suggs was subsequently denied youthful offender treatment by Justice Tierney on July 31, 1968.

when he is so inclined." The psychologist concluded that "such projective material as we have, does *not* suggest a true thinking disorder, nor a psychosis. He impresses as willful, defensive, hostile, negativistic, paranoid, & antisocial. We would classify him as a narcissistic [*sic*] behavior disorder[13] of extreme degree, a poor prognosis is quite likely." (Emphasis in original.)

A clinical history sheet evidently prepared by Dr. Messinger on July 17, 1968, shows only superficial mention of Suggs' prior unusual behavior. It refers to his stays at Wiltwyck and Warwick. Beyond this, little psychiatric information is revealed by the history. It indicates that Suggs complained of "'black-outs.'" It also quotes him as saying that "[p]eople yell all the time." Suggs' inability to distinguish truth from fantasy is highlighted by much of the information he provided.[14] Suggs was initially diagnosed "Without Psychosis, but pathologic, emotionally unstable, with depressive and paranoid trends."

On July 23, 1968, Dr. Messinger, who evidently had before him none of Suggs' psychiatric histories compiled at other institutions, submitted a formal report to the Supreme Court of the State of New York, indicating "that [Suggs] is without psychosis and of average intelligence." The next four paragraphs discuss the psychological tests, mentioning appellee's composite I.Q. of 95, and quote the psychological report. Dr. Messinger's own observations were as follows:

13 Dr. Augustus F. Kinzel later testified in the federal habeas evidentiary hearing, on January 21, 1977, that there is no such "known entity in psychology or in psychiatry."

14 For example, the history sheet states that appellee attended high school through the eleventh grade, that he played basketball and the trumpet, that he sang "lead soprano" at Hampton, and that his real father gave him money. It is apparent from subsequent psychiatric histories that these facts are probably untrue.

At interview defendant displays a restless, truculent attitude as he tries to justify his habitual and extreme maladjustment on the conditions under which he was born and raised. He expresses violent antipathies towards his sister and his father, as well as all authority and parental surrogate figures. Review of his past shows that from his earliest years he has been indolent, rebellious, and intolerant of any restraint or restriction. He gets into fights both in and out of institutions and says, "I don't need friends. If I make friends sooner or later they are my enemies."

Defendant's personality classification seems best described as that of the Pathologic Personality Group. Emotionally Unstable Type, with depressive and paranoid trends.[15]

The court's copy of this report apparently went astray. It was not in the court file at the time of the plea proceedings before Justice Nunez. Its existence did not become known until April 1, 1975, when it was discovered by an Assistant Attorney General while the first appeal to this

15 Dr. Kinzel, at the federal habeas evidentiary hearing, criticized this report:

> [An]other concern I had about the report, is that it is not a psychiatric examination. It has a review of the psychological tests. It has some comments on his current mental state, as he observes him, but there is no history here, and a psychiatric examination basically has to have a history of present illness, of past illness, family illness, childhood history. It has to have some current observation of the recent mental state and the current and the recent behavior, and then some diagnosis based on those findings.
>
> Really what this is is more of a rather cursory description of part of the present mental state. In other words, it is not what one would generally consider a complete psychiatric examination.

It must further be stressed that this report did not address the issue of appellee's competence to be tried. At the hearing before Justice Melia it was characterized by Justice Nunez, who presided at Suggs' plea proceeding, as "only a preliminary report," relating to the propriety of Youthful Offender treatment. *See* II, B, 3, *infra*.

court from Judge Duffy's initial issuance of the writ was pending.

2. Purported Suicide Attempt.

Following Dr. Messinger's examination on approximately July 26, 1968, Suggs was sent to the Brooklyn House of Detention for Men. On August 1, 1968, he was placed under special mental health observation due to a "self-inflicted injury" and an undated letter from Suggs suggesting the possibility of suicide.[16]

According to Warren A. King, the psychiatric social worker who conducted the mental health evaluation, Suggs told him that Suggs had attempted to hang himself to "retaliate against parents because they refused to write or visit." King noted in his report that before the transfer, he had warned the correction officers that "this inmate could possibly be assaultive." He stressed that Suggs had a "long history of acting out behavior and resulting institutionalization" and "is quite disturbed, and has a great deal of underlying hostility." This incident apparently was not known to Suggs' counsel or to any judge before whom appellee appeared until the hearing before Judge Duffy in January, 1977.

3. The Plea of Guilty Before Justice Nunez.

On September 13, 1968, Suggs, accompanied by his Legal Aid lawyer, Donald Tucker, pleaded guilty before Justice Nunez to one count each of rape in the first degree and of robbery in the first degree in satisfaction of all counts

16 The letter stated:

> Dear Mr. Officer's
>
> if you was me what will you do if you knew you was facing a life time Sentence, Plus you don't have no one Visiting you or Writing you What Will you do. So I feel my best way out is a Easy Way. I Will not tell you What my Easy Way is but you soon find out.

of the indictments. It is on this date that appellee's competency is in question. According to Mr. Tucker, Suggs came out of his cell on September 13 demanding to plead guilty to the charges and fully admitting his guilt as to all of them. Suggs signed a statement to that effect for Mr. Tucker.

Prior to accepting the pleas an extensive colloquy was held between Suggs and Justice Nunez, which was alluded to at length both by Justice Melia in the subsequent state court evidentiary hearing and by Judge Duffy in his opinions. Suggs related some of his family and school history, and in the process stated that he had been examined at the psychiatric clinic "right downstairs."[17] In response to the court's questions, Suggs described one rape incident and one robbery. Asked the reason why he attacked the rape victim, he said, "I just had it in mind." When asked why he threatened another woman and stole her purse, Suggs replied, "I just wanted to steal it."

During the course of the colloquy, Suggs answered affirmatively questions concerning the voluntariness of his plea,[18] subsequently mandated by *Boykin* v. *Alabama*,[19]

17 Justice Nunez then asked the court clerk whether Suggs had undergone a psychiatric examination. The clerk responded that there was no such record in the file.

18 Thus he said that he had consulted with his counsel, had heard the facts of the case as related to the court by the district attorney and that his guilty pleas were voluntary and not due to threats or promises.

The district court has suggested that the colloquy did not sufficiently apprise Suggs of the consequences of his plea, since there was no discussion of the specific constitutional rights waived by a plea of guilty, the potential maximum sentence Suggs might have to serve or the possible minimum sentence that would have to be served prior to parole. 390 F. Supp. at 386. It is unnecessary, however, to rule on this matter in resolving the issues on appeal.

19 Rule 11 of the Federal Rules of Criminal Procedure governs such questioning in the federal courts. *See* Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 Yale L.J. 1395 (1977) [hereinafter Note, *Collateral Attack*].

supra. Immediately before accepting the pleas the following conversation occurred:

> The Court: You are not sorry at all that you did any of these things, Mr. Suggs?
>
> The Defendant: Nothing to be sorry about.
>
> The Court: What?
>
> The Defendant: There is nothing to be sorry about.
>
> The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?
>
> The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.
>
> The Court: No matter what you do?
>
> The Defendant: No matter what I do.

Plea Minutes at 17-18, *People* v. *Suggs*, Nos. 3063-68, 3063A-68 (N.Y. County Sup. Ct., Sept. 13, 1968) (hereinafter Plea Minutes). Justice Nunez then accepted the pleas, but continued to question Suggs further on his lack of remorse. It is at this critical point in the record that the case takes on its full ramifications:

> The Court: Well, now, Mr. Suggs, you know that you are going to be punished for these crimes, do you not?
>
> The Defendant: Yes, sir.
>
> The Court: Well, don't you think it might help you if you show that you are sorry, you show some compassion for your victims?
>
> The Defendant: I tried that once.
>
> The Court: What?
>
> The Defendant: I tried that once.
>
> The Court: You tried that once? When was that?
>
> The Defendant: When I was small.
>
> The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger, you say?

The Defendant: Part of it.

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.

Id. at 19-20.

Whether it was the description of the incident of his mother's cutting off his finger—something which was untrue from other past histories, *see* note 5, *supra*—Suggs' lack of remorse, or his general demeanor, something rang a bell with Justice Nunez. He immediately said: "Set it down for investigation and sentence October 31st. I want a complete psychiatric examination and report on this boy. And for that purpose I wish to commit him on my motion to Bellevue Hospital for examination and report." *Id.* at 20. Justice Nunez then explained to appellee: "We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be—whom are you mad at?" The defendant answered, "No one." The court responded: "All right, see you on the 31st. Try to cooperate with the doctors. See if they can help you." *Id.* at 21.

Years later, at the state evidentiary hearing, Justice Nunez, who recalled the Suggs case due to appellee's "unexpected responses," testified by stipulation that he had ordered the Bellevue examination not just as an aid in sentencing but "for all purposes, including a determination of whether defendant was competent to be tried."[20] He also testified that even had he been aware of Dr. Messinger's report of July 23, 1968, he still might have ordered the Bellevue examination since

> [t]he defendant's answers were unusual. The Messinger report was only a preliminary report because the Psychiatric Clinic does not have the time or the facilities to make the kind of complete examination that can be done at Bellevue Hospital. [It] said that the defendant was without psychosis and did not speak to the issue of whether he was competent to be tried.

C. *The Psychiatric Examinations After the Plea: The Lubin and Kadar Reports*

A psychiatric caseworker at Bellevue, Mr. Jacoby, interviewed Suggs four days after his plea, on September 17, 1968. His records evidence appellee's highly disturbed state,[21] noting that Suggs was sullen, somewhat withdrawn, and extremely infantile. Suggs avoided all eye contact

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20 The State argues that the psychiatric examination was "in aid of sentencing," as indicated in the court's docket entry. Thus, they contend, Suggs' commitment to Bellevue following his plea was not an indication that Justice Nunez, the defense or the prosecution thought that Suggs was incompetent. Rather, the State argues, had anyone considered Suggs incompetent, the judge would not have permitted entry of the guilty pleas. Appellee argues that the plea minutes as well as Justice Nunez' testimony clearly show that Justice Nunez ordered the examination to determine whether Suggs was competent to be tried. Suggs explains that Justice Nunez did not set aside the plea after ordering the psychiatric examination so that a new plea would not have to be entered if Suggs subsequently were declared competent.

21 Suggs rambled on about his past history, often making little sense and inventing stories. He nonchalantly offered information concerning a murder which he said he had committed, explained that the current charges were the result of a misidentification and that he didn't trust his lawyer, characterized himself as a drug dealer, and requested that his mother (probably meaning his aunt unless he was under a delusion) help him this time, as she had not done so before.

and showed no emotion or guilt while relating the facts surrounding the alleged crimes he committed. "His underlinging [*sic*] hostility, confusion, desorganization [*sic*] was manifest throught [*sic*] the course of [the] interview." His "poor judgment and inability to control agressive [*sic*] impulses were evidential [*sic*] . . . ."

Two days later, six days after the reference to Bellevue by Justice Nunez, Suggs was examined by Dr. Lubin, chief psychiatrist at the Bellevue Prison Ward, who without any knowledge of the Messinger report, of Suggs' medical history in the Rockland State Hospital records or of Suggs' suicide attempt six weeks before in August, 1968, still concluded that Suggs was incompetent. His tentative diagnosis from this first interview characterized Suggs' mental condition as "schizoid with paranoid features."[22] Dr. Lubin viewed Suggs as a young sullen boy who "sees circumstances [*sic*] around him [in] a badly distorted fashion."[23] It appeared to him that "petulance and anger" played a role in Suggs' decision to plead guilty. He concluded by noting that appellee could be competent with the help of vigorous defense counsel.[24]

22 He subsequently explained at the state evidentiary hearing before Justice Melia that such a diagnosis indicates incompetency.

23 Suggs this time claimed innocence to the rape and robbery charges not on misidentification grounds, as he had told the caseworker, but because the police had arrested him in revenge for the assault he allegedly committed on the police officer at City College. He said that he pleaded guilty on Mr. Tucker's advice that this was his best chance of minimizing the sentence. Mr. Tucker, however, testified at the federal hearing that Suggs had insisted on pleading guilty. *See* note 46 & accompanying text *infra*.

24 This conclusion may have been based on his observation that in periods of lucidity appellee could adequately describe the details of the crimes with which he was charged. Dr. Lubin questioned, however, whether Suggs could be made to understand that he actually would have to face these charges. This prompted him to visit Mr. Tucker, the Legal Aid attorney, who thought that Suggs' criminal activities were the means by which he could strike back at society. Mr. Tucker told Dr. Lubin that

He later elaborated on this notation at the hearing before Justice Melia, indicating that while Suggs was then incompetent to stand trial, he could perhaps be "assisted to a state of cooperation where he might then be considered competent" through the "vigorous assistance" of his attorney.

A second preliminary report date September 25, 1968, confirmed the doctor's earlier diagnosis.[25] The doctor's impression was schizophrenia, paranoid type. Again, Dr. Lubin noted that Suggs views the world in "a totally distorted fashion, such that even the most innocuous stimuli lead to believed persecution." He found extant paranoid delusions reflected in Suggs' extreme suspiciousness, negativism, inability to communicate meaningfully and his predisposition to violence, as well as Suggs' rationalizations for the numerous rapes.

Dr. Lubin, in conjunction with Dr. Kadar, made a third examination of Suggs on October 21, 1968, resulting in a final report to the court which, in large part, summarizes the two preliminary reports. They first discuss appellee's history of behavior problems and prior treatment in various reformatory institutions. They note that while Suggs was claiming innocence at Bellevue, his "ancillary history seems to indicate that he actually made specific and detailed admissions of [his criminal acts] and in a manner to communicate [to the court] that these activities

the court felt the violent acts were retaliatory, probably the result of delusions of persecution. Mr. Tucker informed the doctor that before Justice Nunez, Suggs had given a detailed account of the crimes, contrary to his claims of innocence made while at Bellevue. The attorney also revealed that Suggs had told the court that the rapes were in response to a rape of his sister years earlier. We note that the July, 1968, Messinger report indicates that Suggs had "violent antipathies toward his sister."

25 In finding appellee incompetent to stand trial, Dr. Lubin at this time considered and rejected the possibility that Suggs was feigning incompetency.

were based on bizarre motivations and were possibly a function of mental disorder." The report concludes that Suggs sees things in a "totally distorted fashion," has the psychosis of "schizophrenia, paranoid type," and is "in such a state of insanity as to be incapable of understanding the charge, proceedings, or making his defense." [26]

D. *Judicial Determination of Incompetency*

On November 6, 1968, Suggs was returned to court with the Lubin-Kadar report. The case came before Justice Gold rather than Justice Nunez. Although Justice Gold has no recent recollection of the proceeding, as he testified by stipulation in the federal evidentiary hearing below, the minutes indicate that the district attorney chose to "confirm" the report and waive a hearing.[27] Justice Gold declared Suggs incompetent to stand trial and committed him to the custody of the Commissioner of Mental Hygiene.

E. *The Sojourn at Matteawan*

On November 15, 1968, the Commissioner committed Suggs to Matteawan, a state hospital for the criminally insane. A tentative diagnosis on November 15, 1968, confirmed Dr. Lubin's findings. Suggs was characterized as a schizophrenic, paranoid type. His behavior at Matteawan continued to exhibit delusional thinking. On admission he was "distant, dull, tense, hostile," with a "tendency

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26 The New York statutory test of incompetency to stand trial was then whether the defendant is in "such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense . . . ." N.Y. Code of Crim. Proc. § 662-b(1) (McKinney Supp. 1970). The current version, N.Y. Crim. Proc. Law § 730.10 (McKinney Supp. 1976), became effective September 1, 1971.

27 The district court at one point erroneously believed that a hearing had been conducted. 390 F. Supp. at 386.

to ramble." He said that many of his statements at Bellevue were "lies," made to feign mental illness so that he would be sent to a hospital. Yet the Bellevue records reveal that he protested at being hospitalized. He claimed that he had lied about having hallucinations, but shortly thereafter he demanded his own room, fearful that someone might attack him. He also boasted of having made a lot of money, of his father's having deposited $5,000 for him when he was born and of his mother's having left him $17,000. He would admit and then later deny that he had committed the rapes and robberies.

Subsequently, with the use of the drug Librium, he became "no management problem," his behavior now "childish and silly." He continued to assert that he had put on an act at Bellevue in order to be sent to the hospital, while expressing anger toward his lawyer who "had sent him to a hospital in order to get rid of him." He complained of a frameup, and each time he was seen offered different information as to his income and bank accounts. Matteawan came to the conclusion as of December 18, 1968, that he had a psychosis with a history of longstanding maladjustment and antisocial activities, that he was never able to form close relationships and that he showed suicidal and homicidal tendencies. The staff diagnosis was "Psychosis with Antisocial Personality, Paranoid and Reactive features."

An "auto-anamnesis" or history of Suggs conducted on January 17, 1968, revealed additional "fanciful" and "extraordinary" stories. Appellee explained that he had never worked (though he had earlier stated that he earned hundreds of dollars each week as a musician and karate teacher) because his father sent him money to make up for turning Suggs' mother into an alcoholic, thereby causing her death. Suggs earlier had told Justice Nunez that he

had not heard from his father for many years. Plea Minutes at 9. Suggs also revealed that he had taken out a "contract" on his father's life, and that he had admitted committing the offenses to "get off the streets" and to avoid a contract the Mafia had out on him. His birthdate had now become 1947 instead of 1951; hence he claimed to be twenty-one rather than the seventeen indicated in prior medical records. He also stated that he had been married for "quite some time," and got along "very well" with his wife and child. Letters written to his "wife" as well as to his aunt were not answered.

On January 25, after having been off medication for fifteen days, Suggs was assaulted when he made sarcastic, racial remarks to other patients. More significant is Suggs' statement to a doctor on February 22 that though there had been something wrong with him when he arrived, he now felt that he was well. He explained: "I convinced myself that I did something that I didn't do it." The doctor noted that "[h]e was referring to pleading guilty to his indictment." When asked if he knew that he was convicted he said, "I don't [*sic*] know my original charge was murder and they changed [*sic*] to statutory rape."

On March 18, 1969, Suggs, seen in special consultation by two doctors, "tried to confuse the issue about his age," stated that he had lied to the doctors in Bellevue when he told them that he did not understand the charges, and emphasized that he had money in the bank from dealing in drugs. He repeatedly referred to being arrested on a charge of murder, claiming his innocence, and discussed the fight at City College with the police officer who, he said, kicked him in the groin after telling him to stand against the wall. Suggs, after being read a letter by the district attorney which indicated that he was not charged with murder, said, "I have tried to go to a real hospital because I know I do have problems." The doctors concluded that his mental condition had improved but that he remains "immature, insecure and unstable" with a "tendency to explosive reactions on slight provocation" and that "[o]n the ward he is considered very excitable and unpredictable."

On April 1, 1969, he was seen again by the same two doctors who found him more composed. He had now made up his mind to return to court to face criminal charges against him, although he was then claiming that he did not commit the crimes for which he had been indicted. He still insisted that he had money in the bank—this time $25,000 which he inherited from his mother.

The Matteawan superintendent certified Suggs as competent on April 4, 1969. A letter to the court said that after Suggs' admission he had shown continued symptoms of mental illness. Under treatment with "psychotropic" drugs, his mental condition had gradually improved to the point where, unlike a few months earlier, he was able to give a coherent and relevant account of the events leading to his arrest. The diagnosis remained "Psychosis with Antisocial Personality, Paranoid and Reactive Features."

F. *Competency Certification and the Second Messinger Report*

Suggs was certified as competent on the basis of the Matteawan reports by Justice Schweitzer on April 9, 1969. He was reexamined pursuant to a special court order of April 30, 1969, by Dr. Messinger. The latter's one-page report on May 20, 1969, referred to his first examination in July, 1968, when the doctor "did not find [Suggs] psychotic, but considered him to be a case of severe sociopathic personality disorder." Dr. Messinger now found Suggs "calm, cooperative, cool and calculating," and "oriented in all spheres . . . [with] an excellent memory both for recent

and remote events." He also found that Suggs "denies any delusions or hallucinations, and carefully considers the various alternatives open to him in facing his current charges." Dr. Messinger again diagnosed him "as being of the Pathologic Personality Group, Emotionally Unstable Type, with paranoid and depressive tendencies."

G. *The June 6, 1969, Sentencing*

Suggs appeared with newly appointed counsel, Mr. Tobin, before Justice Schweitzer on June 6, 1969. The court clerk declared the proceeding an "arraign[ment] . . . for sentence on your plea of guilty" to the crimes of rape and robbery, each in the first degree. When asked by the clerk whether Suggs could show legal cause why judgment should not be pronounced against him, he replied in the affirmative, saying: "Judge, at that time I wasn't capable of understanding the case."

The sentencing minutes reveal that his attorney had received an adjournment sometime earlier to formalize an application to withdraw the pleas of guilty. However, two days before the June 6 proceeding Mr. Tobin had informed Justice Schweitzer that Suggs did not want to withdraw his plea and was willing to accept sentence. Suggs was then interrogated at the proceeding on whether he wished to be "sentenced today" or to have an adjournment of his sentence to confer further with his attorney about withdrawing his guilty pleas. He wished "to be sentenced today," not to withdraw his pleas of guilty and not to have an adjournment.

He was sentenced, based on his guilty pleas of September 13, 1968, after a plea for leniency by counsel, to five to fifteen years' imprisonment on each of the two counts, the sentences to run concurrently. He is still serving these sentences in the New York prison system. In the sentencing colloquy before Justice Schweitzer, none of the questions on voluntariness, factual basis for the pleas, or comprehension of waiver of rights, required by *Boykin* v. *Alabama, supra,* and *United States ex rel. Dunn* v. *Cassles,* 494 F.2d 397 (2d Cir. 1974), was asked.

H. *Postconviction Relief*

1. Grant of Habeas Corpus Relief.

It is unnecessary to recount all of the state and federal proceedings taken on Suggs' behalf after sentencing. They are set forth in the opinions of Judge Duffy[28] and of this court.[29] Suffice it to say that following Suggs' various unsuccessful challenges to his conviction in state appellate and postconviction proceedings, on February 25, 1975, Judge Duffy granted habeas relief without holding a hearing, 390 F. Supp. 383. He found the guilty pleas entered before Justice Nunez on September 13, 1968, void under *McCarthy* v. *United States, supra,* and *Pate* v. *Robinson, supra,* because entered when Suggs was incompetent.[30] He further determined that the sentencing before Justice Schweitzer was not a valid substitute for the void guilty pleas because the state court did not conduct an inquiry into whether Suggs' previous void plea (or his decision not to withdraw it) was voluntary, as required by *Boykin* v. *Alabama, supra;* nor was inquiry made into the factual basis of the pleas, as mandated by *United States ex rel.*

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28 390 F. Supp. 383; 400 F. Supp. 1366 (S.D.N.Y. 1975); 422 F. Supp. 1042 (S.D.N.Y. 1976); 430 F. Supp. 877 (S.D.N.Y. 1977).

29 *United States ex rel. Suggs* v. *LaVallee,* 523 F.2d 539 (2d Cir. 1975).

30 In so holding, the district court relied on the judicial determination of incompetency rendered by Justice Gold on November 6, 1968, Suggs' subsequent commitment to Matteawan, the October 21, 1968, report of Drs. Lubin and Kadar which concluded that Suggs was incompetent, and Suggs' "bizarre" responses during the plea colloquy with Justice Nunez on September 13, 1968.

Dunn v. *Casscles, supra.*[31] The district court also rejected the State's arguments that Suggs' decision not to withdraw his plea at sentencing effected a ratification of the prior invalid pleas or a waiver of his objection to their invalidity.

2. Discovery of Dr. Messinger's Reports and the Remand for an Evidentiary Hearing.

During the pendency of the State's appeal from Judge Duffy's order, the two Messinger reports were discovered. This court remanded the case for an evidentiary hearing on the issue of Suggs' competency at plea because of the issue of fact raised by the contradictory conclusions reached in the Messinger and Lubin-Kadar reports.[32] 523 F.2d at 542-43. Whether the evidentiary hearing was to

31 Contrary to the requirement of an affirmative showing on the record of an explicit waiver of constitutional rights, *see* text at III, B, 1-2, *infra*, the district court found:

> Inspection of the sentencing minutes reveals a complete absence of any meaningful inquiry into the voluntariness of petitioner's earlier plea. The sentencing court's sole inquiry was directed to the question of whether petitioner wished to withdraw his earlier plea. Upon the defendant's acquiescence in the earlier plea, the court proceeded without any further inquiry of its own into the original plea's voluntariness or the voluntariness of a now-competent defendant's ratification of a plea made when he was incompetent. No inquiry whatever was made of petitioner at any time during which he was competent as to whether any promises had been made to him, whether he had been coerced, whether he was acting under his own free will either with respect to his invalid plea or his decision not to withdraw it.
>
> Moreover, no inquiry was made of the defendant, now that he was competent, as to whether there was a proper factual basis for his plea. United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir 1974); McCarthy v. United States, *supra*.

390 F. Supp. at 388-89.

32 We did not consider the district court's rulings rejecting the State's contentions that Suggs had ratified his earlier pleas or waived objections to them by failing to withdraw the pleas when given the opportunity to do so by the sentencing court. 523 F.2d at 542 n.1.

be held by the state or district court was left to the discretion of Judge Duffy. *Id.* at 543.[33]

Judge Duffy ordered a state hearing. He reasoned: "Since the necessary witnesses will include Justices of the [State] Supreme Court [including Justices Nunez, Sandifer[34] and Gold], the proper forum for taking their testimony would be the Supreme Court of the State of New York." 400 F. Supp. at 1367.

3. The State Evidentiary Hearing on Competency.

Pursuant to Judge Duffy's order, on November 17 and December 1, 1975, a hearing was held before Justice Melia, who assumed that he was to hold, and did hold, a full-fledged evidentiary hearing on the issue of Suggs' competency at plea.[35] Counsel for Suggs called Drs. Lubin

33 We had in mind two competing interests: "the congressional policy of requiring exhaustion of available state remedies" and "the equally important policy of not exhausting state prisoners who seek to assert their federal constitutional rights." *Id.* at 543. This court was under the mistaken impression due to an omission in the record, *see* notes 42-43 & accompanying text *infra*, that appellee might not have exhausted his state remedies.

34 On December 6, 1973, Justice Sandifer had rejected Suggs' argument made on a motion to vacate judgment that the sentencing court was required to inquire into the voluntariness of Suggs' pleas. *People* v. *Suggs*, Nos. 3063/68, 3063A/68, 2251/68 (N.Y. County Sup. Ct., filed Dec. 6, 1973). Leave to appeal was denied on March 5, 1974.

35 The district court, in its November 16 opinion, explained that it had requested the state court merely to take testimony and to make narrow "findings concerning knowledge of the existence of the Messinger reports." 422 F. Supp. at 1043. This construction of the order is consistent with Judge Duffy's specific request that the state court ascertain whether enumerated judges and attorneys were aware of the Messinger reports. 400 F. Supp. at 1367. According to Judge Duffy, the state court's determination that Suggs was competent "went far beyond this narrow matter referred for resolution." 422 F. Supp. at 1044-45.

The State argues that the order did not impose limits on the state court's decisionmaking function. Because the district court suggested witnesses to be called, sanctioned the examination of other witnesses not designated by the court, allegedly urged the parties to present all avail-

and Kadar, who testified on their reports;[36] Justice Nunez, who testified by stipulation that he had ordered Suggs sent to Bellevue for "all purposes" including competency, and that he probably would have ordered a more complete examination had he known of the first Dr. Messinger report, *see* II, B, 3, *supra;* and Justice Sandifer, who testified by stipulation that he had no knowledge of the first Messinger report when he rendered his decision on December 6, 1973. *See* note 34 *supra.* For the State, Suggs' lawyer, Mr. Tucker, testified that at the time of the September 13, 1968, pleas, he thought Suggs competent, but had he known of the Messinger report he would have requested an additional psychiatric examination before allowing Suggs to plead. The assistant district attorney testified that nothing during the plea colloquy made him think Suggs incompetent. And Dr. Messinger testified as to his July, 1968, and May, 1969, reports and the July, 1968, psychologist's report on which the doctor had relied.[37] Justice Gold did not testify.

able evidence to the state court, and made the reference in response to the opinion of this court, which had ordered a full evidentiary hearing on the issue of Suggs' competency at plea, appellant contends that Judge Duffy did request a hearing on and a determination of the issue of Suggs' competency at plea.

36 Both doctors reaffirmed their conclusions of incompetency and explained the factors which led to their conclusions. Dr. Kadar testified that he did not recall having previously seen the July 23 Messinger report. He could not give an opinion as to its accuracy because he could not form an opinion either way on Suggs' competency at any time prior to his examination of Suggs.

Dr. Lubin testified that while he found Suggs incompetent to stand trial from the first interview on Sepember 19, 1968, onward, he could not say definitively that Suggs was incompetent on the day of his plea.

37 Dr. Messinger explained that although the psychologist had found appellee uncooperative much of the time, "it was a willful type of negativism that led him to not cooperate in parts of the testing." The doctor also noted that Suggs was more cooperative during Dr. Messinger's examination of Suggs. He clarified his July 23, 1968, diagnosis of Suggs to mean a "sociopathic personality" which is considered competent according to "general psychiatric definition." Although Suggs was "paranoid," he had not lost contact with reality to such an extent that he was psychotic. Since the doctor did not detect any "divorce from reality," he found Suggs competent.

He explained further that appellee was not under constant observation at the time of his examination, unlike the procedure at Bellevue. Thus the doctor might not have been aware of "short psychotic episodes" or other unusual behavior. Dr. Messinger did not consider his diagnosis inconsistent with the other reports finding Suggs psychotic and incompetent, because his finding of competency on July 23, 1968, did not necessarily mean that Suggs was competent on September 13, 1968; "people who are found competent on one day can become psychotic or incompetent at another time . . . ."

Justice Melia, in an opinion dated December 3, 1975, found that Suggs was competent on September 13, 1968, when he pleaded guilty before Justice Nunez. *People* v. *Suggs, supra,* Nos. 3063/68, 3063A/68, 2251/68, at 29. He relied on the extensive plea colloquy[38] as well as the tactical considerations underlying the plea bargain[39] as clear evidence that Suggs "knew where he was and what he was doing" in pleading guilty on September 13. *Id.* at 17. He also considered it significant that Suggs was represented by an "extremely able and experienced attorney," *id.* at 18, who "found no reason, either prior to or during plea, to

38 The court stated:

> [T]he minutes of plea reflect no impairment of memory. He answered questions covering many aspects of his life from birth to date of arrest and even recalled Dr. Messinger's examination some six weeks prior to plea. He recalled the crimes to which he pleaded and volunteered information in connection therewith. He demonstrated a capacity to exercise judgment. He was able to assess the ages of two of his victims. His answers were responsive, relevant, and illuminating.

People v. *Suggs,* Nos. 3063/68, 3063A/68, 2251/68, at 29 (N.Y. County Supp. Ct., filed Dec. 3, 1975).

39 Justice Melia noted:

> The defendant faced multiple count indictments embracing many unrelated crimes . . . . Would not competent judgment dictate the acceptance of the best offer in order to avoid convictions on multiple counts with the added impact of the court having heard live testimony of victims?

Id. at 18.

lead him to believe that the defendant was incompetent [although] counsel did agree with Judge Nunez that an examination would be desirable as an aid in imposing sentence." *Id.* at 29. No mention was made of Tucker's testimony that he would have requested an examination had he been aware of Dr. Messinger's July 23, 1968, report.

Similarly, Justice Melia concluded that Justice Nunez could not have considered Suggs incompetent: "Certainly an able and experienced jurist such as Judge Nunez did not then believe the defendant to be incompetent else he would not have accepted the plea." *Id.* The court noted that "psychiatric examinations are often made after a guilty plea and prior to sentence as an aid and guide to the court in the imposition of sentence." *Id.* at 5. Justice Melia did not discuss either Justice Nunez' testimony that he had ordered the Bellevue examination for all purposes including a determination of competency, or the plea minutes containing Suggs' story about his mother's cutting off his finger, which prompted Justice Nunez to order the psychiatric examination. Nor did he find controlling Justice Gold's subsequent November 6, 1968, finding of incompetency.[40]

And he relied on Dr. Messinger's testimony, which "seemed . . . to be highly credible and reliable. The testimony of Drs. Kadar and Lubin was not as impressive." *Id.* at 28. Yet Dr. Messinger's July, 1968, report was subject to certain shortcomings revealed by Justice Nunez, *see* note 15 *supra*, II, B, 3, *supra*, and subsequently by Dr. Kinzel. *See* notes 13-15 & accompanying text *supra*. Moreover, the doctor had no recollection of "the person, John Suggs, personally," at the time of his testimony before Justice Melia.[41] Furthermore, the interviews with Dr. Lubin began only six days after the plea proceeding and involved a more extensive psychiatric examination than that performed by Dr. Messinger.

Finally, Justice Melia went one step beyond even a broad interpretation of Judge Duffy's order—that an evidentiary hearing on competency be conducted. *See* note 35 *supra*. He held that assuming Suggs' incompetency at plea, the latter ratified his pleas of guilty at the June 6, 1969, sentencing hearing. This matter had previously been disposed of to the contrary by Judge Duffy. 390 F. Supp. 383, 388-89.

40 Justice Melia stated:

> The District Court, in its opinion herein in 390 F. Supp. 383 at p. 389, said, "It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to stand trial, such a plea *must* be considered null and void . . . ."
>
> I respectfully submit that that is neither true as a matter of fact nor law. Indeed the psychiatrists, Drs. Kadar and Lubin, called by the defense here, concede that the defendant could very well have been competent on September 13 when he entered his plea. And Dr. Messinger who found him to be competent on July 23, 1968 conceded that the defendant could have been incompetent on 9/13/68.

Id. at 17 (emphasis in original).

41 This lack of recognition does not seem remarkable, given the large number of people Dr. Messinger was examining in 1968. However, Dr. Kinzel subsequently testified in the federal evidentiary hearing that he found Dr. Messinger's memory loss revelatory of the cursory nature of the examination since a thorough psychiatric examination brings out individual histories that awaken the psychiatrist's recollection.

42 The State does not dispute this on appeal.

4. Judge Duffy Orders a Federal Evidentiary Hearing.

On November 16, 1976, Judge Duffy ordered a federal evidentiary hearing on the issue of Suggs' competency at plea. 422 F. Supp. 1042. Initially, he dismissed the State's argument that Suggs' relief lay in appealing Justice Melia's decision in the state courts on two grounds: (1) Suggs had already presented his claim of incompetency to the state courts in a second coram nobis petition[42] that had been omitted from the record on the first appeal to this

court;[43] and (2) Judge Duffy had referred the matter to the state court "out of respect for the convenience of the Justices in the State system, whose testimony was essential," not out of exhaustion considerations. 422 F. Supp. at 1044.

The district court then offered three principal reasons why Suggs was entitled to a federal evidentiary hearing. First, Judge Duffy said that he had remanded the case to the state court "for the mere taking of testimony to determine whether those involved with the case had knowledge of the Messinger reports," and that the findings of competency and ratification exceeded the scope of his order. *Id.* at 1044-45; *see* note 35 *supra*. Second, the district court found certain assumptions underlying Justice Melia's determination of competency contradicted by the record.[44] 422 F. Supp. at 1045. Third, Judge Duffy determined that the merits of the factual dispute were not fully developed in the state hearing, 28 U.S.C. § 2254(d)(1), pointing out the "glaring omission" in not taking the testimony of Justice Gold who had declared Suggs incompetent after the plea proceeding. *Id.*

5. The Federal Competency Hearing.

A hearing on Suggs' competency was held on January 17 and 21, 1977. The transcript and exhibits from the state

43 The district court's holding answered the query posed by this court in the prior appeal, 523 F.2d at 543, as to whether the incompetency issue had ever been raised in the state courts. *See* note 33 *supra*.

44 The state court's conclusion that the examination ordered by Justice Nunez was for sentencing purposes only, contrary to Justice Nunez' own testimony, was given as one example. Justice Melia also improperly believed that Judge Duffy in his earlier opinion had found Suggs' behavior bizarre at the plea colloquy because of appellee's lack of remorse. 390 F. Supp. at 386. Judge Duffy, however, was referring to Suggs' *reasons* for not being sorry. This distinction was critical due to psychiatric testimony before Justice Melia to the effect that competent defendants often exhibit lack of remorse for their acts.

hearing were introduced as well as significant new evidence not before the state court.[45] Suggs' entire file from Matteawan, which contained records of his prior hospitalization at Rockland State Hospital, his files from the New York City Department of Correction, his complete 1968 file from the Bellevue Psychiatric Clinic, and his file from the Legal Aid Society were all admitted. A representative of the New York City Department of Correction testified to Suggs' suicide attempt in August of 1968, which, it will be recalled, occurred one week after the first Messinger report was prepared. In addition, Mr. Tucker's testimony revealed that there was something unusual about Suggs' behavior on September 13, 1968, in that Suggs had consistently denied his guilt until the day of his pleas when he became "adamant" and "demanded" to plead guilty.[46]

By far the most illuminating testimony was that of Dr. Augustus F. Kinzel, appointed by the district court. A psychiatrist of impressive credentials,[47] his testimony was heavily relied upon by Judge Duffy in reaching his determination that Suggs was incompetent at the time of his September, 1968, pleas. While a full reading of the doctor's extensive testimony is necessary to appreciate why it was given so much weight, suffice it to say that Dr. Kinzel thoroughly studied all available data on the issue. Based upon various prior medical records[48] unavailable either to

45 It was stipulated that Justice Gold had no recollection of any proceeding concerning Suggs.

46 Mr. Tucker, in order to protect himself, had asked Suggs to sign a statement admitting his guilt. The statement was in the Legal Aid file.

47 He had been a staff psychiatrist with the United States Medical Center for Federal Prisoners in Springfield, Missouri, had taught Psychiatry and the Law at Columbia Law School, had authored numerous articles, and was then an associate in clinical psychiatry at Columbia University.

48 Two of those records are particularly noteworthy. He reviewed the records from Rockland State Hospital, where Suggs had been admitted

Drs. Messinger, Lubin or Kadar, the minutes of the guilty pleas, as well as Dr. Kinzel's examination of Suggs held on January 12, 1977,[49] it was the doctor's opinion that Suggs was suffering from paranoid schizophrenia on September 13, 1968, not merely from a personality disturbance. He disagreed with Dr. Messinger's July, 1968, report which he criticized as the product of an incomplete psychiatric examination, *see* note 15 *supra*, in that it gave no medical or childhood history or details of past illness, and appeared to be a "cursory description of part of [Suggs'] present mental state." He believed that the symptoms Suggs displayed to the many examiners were signs of psychotic illness. Even the psychologist's report on which most of Dr. Messinger's report was based described symptoms of paranoid schizophrenia, rather than of a mere personality disorder, which is probably what the psychologist meant by his diagnosis. *See* note 13 & accompanying text *supra*. He also questioned the validity of the psychological tests because Suggs had not cooperated.

Dr. Kinzel was aware of Suggs' detention house suicide attempt in August, 1968, a few weeks prior to his plea, a fact unknown to the other psychiatrists who had testified before Justice Melia. He reflected that this was only one

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at twelve years of age, noting that Suggs already was forming "false beliefs" of dangers to himself which were inaccurate.

Dr. Kinzel's review of the Bellevue records from July and August of 1965 indicated that the psychiatrists there "felt that [Suggs] was suffering from more than simply a social . . . or . . . conduct disturbance; that he had symptoms . . . which were suggestive but not conclusive of paranoid schizophrenia."

49 The doctor was much impressed by Suggs' then existing "major memory deficit" of events occurring from the time he was at Hampton until sometime after he arrived at Matteawan. He discounted the possibility of feigning, and explained in detail why he "strongly" felt that Suggs' memory loss was caused by a psychotic disorder. He terms the condition "psychotic amnesia."

incident of a "past history of suicidal behavior of a serious kind . . . ." In reference to the plea minutes, Dr. Kinzel not only noted the bizarre finger amputation testimony, terming it a "confabulation,"[50] without "relevance to the issue at hand," but also was impressed by Suggs' "psychotic lack of judgment" as evidenced by his failure to verbalize any motivation or make any attempt to defend his acts. In the doctor's opinion, Suggs "had no serious awareness that he was being charged with very serious things that he should defend himself with." As to Suggs' ability to describe the criminal acts at plea, the doctor said that psychotics can account literally for their conduct without understanding why they did it, whether they should have done it and whether they should explain it. Counsel's lack of awareness was readily explicable since laymen are not easily able to recognize such a psychosis. Suggs' insistence on pleading is evidently common among psychotic defendants.

Dr. Kinzel agreed with the Lubin-Kadar diagnosis as well as the initial diagnosis at Matteawan. He stressed that Suggs' resulting incompetency was a result of a long-lasting psychosis, not episodic in nature, noting that it is very unusual for a patient to be competent one day and incompetent the next.[51] He also felt that even though it was eight years after the fact, given all the history, which

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50 According to Dr. Kinzel, a confabulation is an erroneous or loose association which is a classic sign of psychosis or thinking disorder common among schizophrenics.

51 The doctor did not find Suggs "actively psychotic" at the moment, but appellee still exhibited the "basic and latent signs of schizophrenia." The doctor felt that though there were signs of the "psychotic aspect" of Suggs' illness early on, he "really lost touch with reality in a meaningful way" when he was at Hampton in the latter part of 1967. This "psychotic state" continued through late winter or early spring, 1969, while at Matteawan, and corresponded to the period of time about which Suggs currently could remember little. *See* note 49 *supra*.

even this lengthy exegesis has only touched upon, he could apply basic principles of psychiatry to arrive at his conclusion, with which "few psychiatrists would disagree," that Suggs was psychotic when he entered the pleas and probably was then incompetent to stand trial.

Judge Duffy held, for the second time, on April 5, 1977, that Suggs was incompetent on September 13, 1968. He recounted much of the evidence which we have discussed and then concluded:

> Weighing all the evidence, the conclusion is inescapable that petitioner was incompetent on September 13, 1968. Although Dr. Messinger indicated that petitioner was competent on July 23, 1968, that report was prepared some seven weeks before the pleas were entered, and as reflected in the May 20, 1969 report, Dr. Messinger acknowledged petitioner's psychotic condition which prompted the Matteawan commitment. He also conceded the possibility that petitioner may have been experiencing a psychotic episode even at the time the July [1968] examination was being conducted. The only other indicia of competence is Mr. Tucker's testimony and, although an attorney's opinion as to his client's ability to understand the nature of the proceedings and to cooperate in his defense is significant, *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 . . . (1972), it is by no means controlling, especially in light of Justice Nunez's observation and reaction with which, based on my reading of the plea minutes, I agree. Dr. Kinzel's testimony relating to the account of petitioner's loss of a portion of his finger, and the indications that the finger was crushed and then amputated, rather than chopped off by Suggs' mother, as recalled by petitioner, bolsters my conclusion in this regard.

> Furthermore, the above, coupled with the fact that petitioner was found to be incompetent by Dr. Lubin only six days after the plea, which conclusion was confirmed and corroborated by Dr. Kadar some four weeks later, and that on the basis of the Lubin-Kadar report, without objection by the respondent, petitioner was committed to Matteawan [by Justice Gold], substantially negates any other conclusion but that petitioner was indeed incompetent at the time of the pleas.

430 F. Supp. at 883-84. He vacated the guilty pleas on the basis of *McCarthy* v. *United States, supra,* and *Pate* v. *Robinson, supra,* since they were null and void because taken while incompetent; implicitly adopted the conclusions of his first opinion, 390 F. Supp. 383, which rejected the State's waiver and ratification arguments; and issued the writ of habeas corpus unless Suggs was permitted to replead within 60 days.[52]

III. Discussion of the Law

A. *Effect of Justice Melia's Decision on Competency*

The State argues that Judge Duffy erred in "entirely disregarding" the state court's determination that Suggs was competent when he pleaded guilty, a determination reached after what the State claims was "a full evidentiary hearing," and "amply support[ed]" by the record. Brief for Appellant at 34-35. Principles of comity and federalism, we need not be reminded, require us to accord "great weight," *id.* at 36, to a state court's factual findings, made after a full and fair hearing. *LaVallee* v. *Delle Rose*, 410

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52 Based upon Suggs' history and the letters he wrote to the district court indicating fear for his life and a belief of persecution, Judge Duffy recommended another examination of Suggs' current mental competency prior to new plea proceedings.

U.S. 690 (1973) (per curiam); *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Jennings* v. *Casscles*, No. 77-2064, slip op. at 311, 317 & n.1 (2d Cir. Nov. 10, 1977); 28 U.S.C. § 2254 (d).[53]

53 Section 2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
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> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d).

The State's position may be broken down into four contentions. First, the State asserts that it was "contrary to principles of federalism and comity" to ask the state court merely to take testimony and make findings on whether certain key individuals had knowledge of the Messinger reports without requesting that the competency issue be resolved as well. Brief for Appellant at 37-38. Thus, the argument continues, while the district court itself had the option of holding an evidentiary hearing on competency or of allowing the state court to do so, the "narrow" limits which the district court said it had imposed on the state court's decisionmaking function, *see* note 35 *supra*, are impermissible. Second, the State urges that the limits specified by Judge Duffy, 422 F. Supp. at 1044-45, were an afterthought because the referral was not so limited. *See* note 35 *supra*. Third, the State argues that Suggs not only made no objection to the state court's deciding the issue of competency, but "vigorously" litigated the question. Finally, the State contends that the district court's conclusion, 422 F. Supp. at 1045, that the merits of the factual dispute were not fully resolved, 28 U.S.C. § 2254(d)(1), because Justice Gold did not testify, *see* II, H, 4, *supra*, was erroneous.

We need not settle the knotty issues raised by the State.[54] In our view, whether Justice Melia's findings

54 We note, however, that the presumption of correctness afforded state court factual determinations rendered after a hearing on the merits has traditionally applied to determinations made while the case is before the state courts in the first instance in deference to the state's criminal justice system. In contrast, the hearing before Justice Melia was not

were supported by the evidence was sufficiently doubtful to justify ordering a further evidentiary hearing in the district court's discretion under 28 U.S.C. § 2254(d)(8). Moreover, there were material facts inadequately developed at the state court hearing. 28 U.S.C. § 2254(d)(3).

1. Lack of Evidence.

We have previously noted Justice Melia's finding that Justice Nunez could not have believed Suggs incompetent, "else he would not have accepted the plea." *People* v. *Suggs*, *supra*, Nos. 3063/68, 3063A/68, 2251/68, at 29. Justice Melia, however, did not discuss (1) the factual or the legal impact of the colloquy concerning Suggs' mother cutting off his finger that prompted Justice Nunez on his own motion to order a psychiatric report, (2) Justice Nunez' testimony that he filed such an order to determine whether Suggs was competent to be tried, or (3) Justice Nunez' explicit recognition in the plea minutes that "[the doctors] may be able to help [Suggs] . . . because there is something wrong . . . , apparently." Plea Minutes at 21. In addition, Justice Melia's conclusion that the plea minutes revealed no impairment of capacity to exercise judgment or unusual behavior flies in the face of the impressions drawn by Justice Nunez, who was obviously in a better position to evaluate Suggs' demeanor at the time of the pleas. Justice Melia's omission to analyze this evidence was sufficient, in and of itself, to raise subsection

an original state court trial, appeal or coram nobis proceeding. Rather, it was in response to a reference by the federal habeas court specifically directed to the newly discovered Messinger reports. Judge Duffy chose to refer the matter to the state court, notwithstanding his right to hold the hearing himself, for the convenience of the state judges who would be required to testify. Certainly different considerations from those underlying the restraint principles of § 2254(d) arise when the district court has the power to determine the issue, yet refrains from doing so.

(8) doubt whether the state court finding of competency was supported by the evidence.

Justice Melia's conclusion that Justice Nunez would not have accepted Suggs' plea if he did not believe Suggs to be competent is defective for another reason. If, as Justice Nunez testified, Suggs' commitment was "for all purposes," his acceptance of the plea was necessarily conditional, that is, subject to the condition subsequent of a finding of competency. And Justice Gold's subsequent finding of incompetency to stand trial (acquiesced in by the State) obviously related back to the date of the pleas. The finding was a judicial determination that Suggs had been incompetent at least since the day he was committed by Justice Nunez for psychiatric examination. As Judge Duffy stated:

> Such a psychiatric report, and its subsequent ratification by the court, attesting to a defendant's incompetency, must be interpreted as conclusively invalidating any plea that constitutes a voluntary relinquishment of rights made at a time when a defendant is suffering under such a disability.

390 F. Supp. at 387 (citations omitted). *See Saddler* v. *United States*, 531 F.2d 83, 84 (2d Cir. 1976) (per curiam) (retrospective examination into defendant's mental competency three years earlier at plea granted on appeal from denial of 28 U.S.C. § 2255 petition); *cf. People* v. *Hudson*, 19 N.Y.2d 137, 225 N.E.2d 193, 278 N.Y.S.2d 593 (1967) (remanding after verdict, pursuant to the dictates of then recently decided *Pate* v. *Robinson*, *supra*, for an evidentiary hearing on defendant's competency at the time of trial, without the need to conduct a new trial on guilt or innocence if defendant is found to have been competent), *cert. denied*, 398 U.S. 944 (1970). Thus Justice Gold's com-

mitment order conclusively invalidated the pleas. Yet Justice Melia attached little or no importance to Justice Gold's determination. *See* note 40 *supra.*

Justice Melia made other findings that were also directly contradicted by the record. While noting the importance of Mr. Tucker's view that Suggs was not incompetent, Justice Melia disregarded Tucker's testimony that he would have requested a psychiatric examination before allowing Suggs to plead had he known of the Messinger report.[55] Justice Melia also found Dr. Messinger's testimony more "credible" and "reliable" than that of Drs. Lubin and Kadar. Yet Dr. Lubin's first diagnosis was prepared only six days after the plea in question, and Dr. Messinger conceded the possibility that Suggs' condition could have deteriorated during the seven weeks between his examination and the day of the plea proceeding. Furthermore, all doctors agreed that Drs. Lubin and Kadar had performed a more thorough examination than did Dr. Messinger. A copy of the Messinger report was not even ordered by the state courts to determine Suggs' competency to stand trial Moreover, Dr. Messinger acknowledged that Suggs could have been experiencing psychotic episodes during the July, 1968, examination. The doctor further revealed that he would not have been aware of this mental state unless manifested in aggressive or other behavior that would have put the prison authorities on notice because unlike Bellevue, which provided continuous observation, the Supreme Court Psychiatric Clinic operated on an out-patient basis. Finally, Justice Melia accorded no weight

55 It was subsequently revealed at the federal hearing that although copies of prepleading psychiatric reports in aid of youthful offender determinations were not usually sent to defense counsel, consent of the defendant and his attorney was a prerequisite to conducting such an examination. Nothing in the record indicates that such a procedure was followed prior to the July, 1968, Messinger examination.

to the Matteawan reports rendered after Suggs' commitment by Justice Gold, which substantially corroborated the findings of Drs. Lubin and Kadar.

As stated in *Townsend* v. *Sain, supra,* 372 U.S. at 316 (citations omitted):

> This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. . . . Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record.

We have before us just such a case.

2. Material Facts Inadequately Developed.

Beyond the lack of evidence sufficient to support the state court findings, several material facts were not adequately developed at the state hearing. Therefore, under 28 U.S.C. § 2254(d)(3) Judge Duffy was entitled to reconsider the issue of competency. The suicide attempt at the Brooklyn House of Detention, the apparent suicide note and the correction officers' observation as reported in their records were not before the state court. These events were highly relevant since they occurred after Dr. Messinger's report of July 23, 1968, and prior to the pleas before Justice Nunez in early September, and since they directly reflected upon Suggs' mental condition, his judgment and his rationality.[56] In addition, the state court was not aware of Suggs' Matteawan file which contained his early medical history from Rockland State Hospital. These records shed light on the developmental aspects of Suggs' mental con-

56 A serious suicide attempt reflects irrational thinking of considerable significance, as Dr. Kinzel testified, especially in light of Suggs' past suicidal, depressive behavior.

dition, revealing the complexity and depth of Suggs' emotional problems.

Moreover, no psychiatrist at the state hearing had sufficient information to give an accurate opinion of Suggs' competence on the date of the pleas in question. However, Dr. Kinzel, at the federal hearing, could and did focus on appellee's mental state as of September 13, 1968. With the aid of all prior institutional and medical records, most of which had never been seen by the other doctors, Dr. Kinzel clarified an aspect of the plea colloquy which apparently had troubled Justice Melia. He explained that appellee's lucid description of the details of his crimes did not necessarily indicate competency because psychotics commonly can account for their conduct without comprehending its significance. Justice Melia, without the guidance of psychiatric testimony on this point, had relied heavily on Suggs' descriptions of the crimes in concluding that Suggs was competent. But the United States Supreme Court has explained that

> it is not enough . . . that "the defendant [is] oriented to time and place and [has] some recollection of events," . . . the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." [57]

Dusky v. *United States*, 362 U.S. 402, 402 (1960) (2d & 3d brackets in original).

Finally, after having been given an opportunity to review the Legal Aid files in the federal hearing, Mr. Tucker

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57 For a discussion of the purposes behind the requirement that defendants be competent to stand trial, see Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 457-61 (1967).

offered additional, important information. He testified that Suggs had exhibited unusual behavior on the day of his plea when Suggs demanded to plead guilty, though he had previously consistently asserted his innocence.

3. Conclusion: No Abuse of Discretion.

Considering the record as a whole and the important evidence unavailable to the state court, it cannot be said that Judge Duffy abused his discretion. We think that under §§ 2254(d)(3) and (d)(8) he was entitled to hold a separate hearing. That Judge Duffy could have held the hearing in the first instance, *see* note 54 *supra*, fortifies our view that his independent examination of the evidence was proper.[58]

B. *Waiver and Ratification at the June Sentencing*

The questions we did not reach on the former appeal but discussed by Judge Duffy below in his earlier opinion, 390

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58 The State does not challenge the correctness of the district court's finding that Suggs was incompetent at the time of his pleas before Justice Nunez. This conclusion seems almost inevitable given the record of previous proceedings before Judge Duffy, the first reasonably complete psychiatric record and the testimony of the first psychiatrist who had that complete psychiatric record available to him. If the judge can be faulted at all it is that he, like so many other courts before him, including the state court here, did not limit psychiatric testimony to psychiatric findings. He also permitted psychiatric experts to express the legal conclusions to be drawn from those findings. *See* J. Katz, The Psychiatrist in Court—Expert or Advocate?, Jan. 12, 1970, at 6-10 (unpublished paper presented at St. Louis University, on file at Yale University); Blinder, *Why It's Crazy for a Psychiatrist to Talk About Insanity*, 23 Cath. U.L. Rev. 769, 772-73 (1974); *cf. United States* v. *Brawner*, 471 F.2d 969, 1010-11, 1015-21 (D.C. Cir. 1972) (en banc) (Bazelon, J., concurring and dissenting) (insanity a legal conclusion on which psychiatrists should not testify).

However, the Federal Rules of Evidence permit experts to testify on the ultimate issue for factual resolution. Fed. R. Evid. 704. Moreover, the State, which had previously asked the other psychiatrists for their ultimate legal conclusions on competency, did not object to Dr. Kinzel's testimony.

F. Supp. 383 (S.D.N.Y. 1975), are now unavoidably before this court. The first question is whether, for purposes of federal habeas corpus relief, Suggs waived his claim of incompetency at the time of the pleas by not adequately asserting it at the June 6, 1969, sentencing proceeding. The second is whether he ratified the previous pleas of guilty, accepted after a *Boykin* v. *Alabama*[59] colloquy conducted while Suggs was incompetent, by not withdrawing his pleas when given the opportunity by the sentencing court. That Suggs neither waived nor ratified could be inferred from his sentencing statement, made to Justice Schweitzer: "Judge, at that time I wasn't capable of understanding the case." The fact is, however, that subsequently the sentencing court gave him the opportunity to withdraw his guilty pleas and with counsel present he did not do so. *See* II, G, *supra*.

1. Waiver.

The State relies upon *Wainwright* v. *Sykes*, *supra*, and *Fay* v. *Noia*, 372 U.S. 391, 439 (1963), for the proposition that because Suggs did not, at the sentencing proceeding, adequately assert[60] the claim that he was incompetent at the time he pleaded guilty, he is precluded from later so asserting in a habeas corpus proceeding. Thus, the State argues, Judge Duffy erred in even considering the competency issue. While this argument has initial appeal, careful scrutiny reveals its deficiencies on the facts of this case.

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59 395 U.S. 238 (1969).

60 In view of our disposition of the State's waiver claim, it is unnecessary to determine whether Suggs' brief mention of his possible incompetency, coupled with his subsequent decision not to move to withdraw his pleas, *see* II, G, *supra*, constituted a sufficient objection to preclude application of waiver principles. For purposes of this appeal, without deciding the question, we will assume that he did not adequately raise the issue of incompetency at plea before Justice Schweitzer.

Suggs has claimed throughout these habeas proceedings that he was denied due process by the sentencing court's failure to inquire into the voluntariness of his guilty pleas, as required by *Boykin* v. *Alabama*, *supra*, in light of Justice Gold's finding that Suggs was incompetent at the time of his pleas before Justice Nunez. To evaluate the validity of the sentencing proceeding, a secondary inquiry into Suggs' competency at plea is necessary, since this was the only time at which a *Boykin* colloquy occurred. *Pate* v. *Robinson*, *supra*, and *McCarthy* v. *United States*, *supra*, teach us that a guilty plea made while a defendant is incompetent violates due process and is therefore void. It logically follows that any *Boykin* discussion occurring while a defendant is incompetent is also a nullity. Thus, if Suggs had been competent at plea, there would have been no need to conduct a *Boykin* colloquy at sentencing; for Suggs would have been informed of his *Boykin* rights at a time when he could have understood and intelligently waived them. Conversely, a determination of incompetency would entitle Suggs to a *Boykin* colloquy at the time of sentencing, unless his failure to withdraw his guilty plea after informing the court that he might have been incompetent on September 13, 1968, constituted a waiver of this right.

Boykin v. *Alabama*, *supra*, imposes an affirmative duty on the trial judge to conduct, sua sponte, an on the record examination of the accused to ascertain that he fully understands the consequences of a guilty plea: "[A] waiver of [the] . . . important federal rights [protected by *Boykin* will not be presumed] from a silent record." 395 U.S. at 243 (footnote omitted). *See* 1 C. Wright, *Federal Practice and Procedure* § 172, at 365, supp. at 107 (1969 & 1976 Supp.). Thus, a defendant cannot waive his right to attack a conviction rendered without the *Boykin* safeguards simply because he did not inform the trial judge of the

judge's failure to discharge his duties at the time the error was committed.[61] The accused does not bear the burden of insuring that his plea is voluntary; that onus rests on the court.

Applying these principles to the facts at hand is a relatively simple matter. Because of the peculiar facts of this case, the sentencing court was obligated to inquire into Suggs' competency at plea to determine the necessity of conducting a second *Boykin* colloquy. Suggs had no obligation to apprise Justice Schweitzer of the court's responsibility to comply with *Boykin's* dictates. It is undisputed that Suggs could have successfully withdrawn his prior pleas on the ground of incompetence. However, we cannot accept the proposition that his omission to do so somehow nullified his ability later to contest a *different constitutional deprivation* in a *different proceeding*.[62] Such a conclusion would lead to the nonsensical result that, while a defendant ordinarily does not have to raise a *Boykin* error at the time of its commission (here, at the sentencing pro-

61 *Cf.* Note, *Collateral Attack*, *supra* note 19, at 1396, 1413-14 & n.68 (highlighting sparsity of precedent and inappropriateness of precluding post-conviction attacks on guilty pleas on waiver grounds where a defendant fails to reveal the involuntary nature of his plea to the trial judge at the time of the Rule 11 inquiry).

62 Because we focus on Suggs' objection to the failure of the sentencing judge to make *Boykin* inquiries, rather than on Suggs' failure to object before the sentencing court to the previous invalid pleas, it is unnecessary to consider whether federal habeas review is foreclosed when a defendant does not timely raise a general incompetency claim in the state courts. *Cf. United States ex rel. Callahan* v. *Follette*, 418 F.2d 903 (2d Cir. 1969) (denial of a state prisoner's petition for federal habeas relief alleging that his guilty plea was invalid because of a sentence promise upheld on waiver grounds due to his failure to file a written motion to withdraw the plea though given an opportunity to do so by the sentencing judge after the promise was called to the judge's attention and sentence was imposed), *cert. denied*, 400 U.S. 840 (1970). We note, however, that a claim of legal incompetence to stand trial may be raised in a collateral proceeding under 28 U.S.C. § 2255, without having previously raised the issue on appeal. *E.g.*, *Newfield* v. *United States*, No. 77-2036, slip op. at 99, 106 (2d Cir. Oct. 19, 1977).

ceeding) if an evaluation of this claim subsequently reveals the need to consider another constitutional deprivation made at an earlier time (here, conducting plea proceedings while Suggs was incompetent), the defendant's failure to assert the related secondary error at a time when he was not required to apprise the court of the primary *Boykin* claim would result in a forfeiture of his right to assert both errors. Suggs' incompetence at the time he pleaded was of no consequence to him until Justice Schweitzer failed to conduct a *Boykin* colloquy. Because Suggs was not then obligated to request a colloquy in order to seek habeas relief in the future, it is manifest that he was not required to assert any connected underlying claims of error until he timely raised the *Boykin* issue.

Subsequent to the sentencing proceeding, Suggs presented his *Boykin* claim to the state courts without success.[63] In rejecting this claim, Justice Sandifer did not rely on any failure on Suggs' part to raise the *Boykin* issue at an appropriate time under New York law. Having exhausted his state remedies, he was entitled to pursue the issue in the federal habeas proceeding before Judge Duffy. *See Allen* v. *County Court*, No. 77-2059, slip op. at 539, 545-50 (2d Cir. Nov. 29, 1977). Therefore *Estelle* v. *Williams*, 425 U.S. 501 (1976), *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Wainwright* v. *Sykes*, *supra*, are inapposite. At no time did Suggs fail to raise the *Boykin* issue when required to do so by either state or federal law. *Fay* v. *Noia*, *supra*, to the extent, if any, that it survives *Wainwright*, *see* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1069-77, 1100-02 (1977), certainly does not add weight to the State's contention of waiver. Here there was no bypass of state proceedings, deliberate or otherwise.

63 *See* note 34 *supra*.

Nor do we find convincing the argument that because the *Boykin* colloquy normally occurs at plea proceedings, Justice Schweitzer was unaware of the need to conduct a second *Boykin* colloquy without Suggs' informing him of his claims of incompetence and of concomitant invalid pleas before Justice Nunez. Suggs told the court that he felt he had been incompetent. Moreover, Justice Schweitzer had the record before him. It revealed not only Justice Nunez' order committing Suggs to Bellevue because, to paraphrase Justice Nunez, something was wrong with Suggs, but also Justice Gold's determination of incompetency based on the examination ordered by Justice Nunez. This record certainly should have alerted Justice Schweitzer to his duty to determine the voluntariness of the pleas. *Cf. Saddler* v. *United States, supra,* 531 F.2d at 87 (evidence of mental incompetency presented to the sentencing court but not before the court at plea sufficient "flurry of warning flags" to alert the sentencing judge to the possibility that defendant may have been incompetent to plead, thus requiring a mental examination and a hearing on competency).

2. Ratification.

The argument that Suggs ratified his previous void pleas by failing to withdraw them at the sentencing proceeding stands on no higher footing than the State's waiver claim. *Boykin* v. *Alabama, supra,* establishes that a trial judge may not accept a guilty plea "without an affirmative showing [on the record] that it was intelligent and voluntary." 395 U.S. at 242. And *United States ex rel. Dunn* v. *Casscles, supra,* mandates an inquiry into the factual basis underlying the plea. Here, the sentencing minutes are devoid of any inquiry into either the voluntariness or the factual basis of Suggs' earlier pleas; the

only colloquy at sentence focused on the nonwithdrawal of the previous void plea. Suggs was not, therefore, adequately informed of "the alternative courses of action open to" him at a time when he was competent. *North Carolina* v. *Alford,* 400 U.S. 25, 31 (1970) (citing, *inter alia, Boykin* v. *Alabama, supra*). *Cf. United States* v. *Journet,* 544 F.2d 633, 636 (2d Cir. 1976) (federal requirements under Rule 11 strictly enforced on direct criminal appeal); *but cf. Del Vecchio* v. *United States,* 556 F.2d 106, 110-11 (2d Cir. 1977) (defendant must show prejudice affecting fairness of proceedings or voluntariness of the plea to succeed in a collateral attack based on a Rule 11 violation); *Kloner* v. *United States,* 535 F.2d 730, 733-34 (2d Cir.) (not every right waived must be enumerated pursuant to Rule 11), *cert. denied,* 429 U.S. 942 (1976).

The State argues, however, that by failing to withdraw his invalid pleas at sentencing, Suggs ratified them at a time when he was competent,[64] and that the inquiry conducted by Justice Nunez was accordingly revivified at this later time. We disagree. If Suggs did not have the capacity to stand trial or to plead guilty[65] on September 13, 1968, he hardly could have then comprehended the waiver of his *Boykin*-protected constitutional rights to a trial by

64 Suggs had pursued the claim in the state and federal courts that he was also incompetent at time of sentence without success.

65 It has been held that competency to plead guilty must be greater than competency to stand trial since the former requires an understanding of constitutional rights. *E.g., Seiling* v. *Eyman,* 478 F.2d 211 (9th Cir. 1973). This conclusion was based on the holding in *Westbrook* v. *Arizona,* 384 U.S. 150 (1966) (per curiam), which recognized a distinction between competence to stand trial and competence to waive the right to counsel, the former not necessarily guaranteeing the latter. We need not reach this question, however, since the parties have not objected to the use of the New York statutory test of incompetency to stand trial, *see* note 26 *supra,* throughout these proceedings to determine Suggs' competency to plead guilty. Moreover, it may be drawing too fine a line to be susceptible of scientific evaluation. *See* Note, *Competence to Plead Guilty: A New Standard,* 1974 Duke L.J. 149, 170.

a jury of his peers, to confrontation of witnesses, and to a privilege against compulsory self-incrimination, 395 U.S. at 243. Thus, there was no prior "voluntary and intelligent" waiver of these rights which Suggs ratified at the sentencing proceeding. Because of appellee's incompetence, it is as if the *Boykin* colloquy before Justice Nunez never occurred. *See McCarthy* v. *United States, supra; Pate* v. *Robinson, supra.* Accordingly, there was never a plea of guilty when Suggs was (a) competent and (b) informed of his *Boykin* rights. Judge Duffy well stated our view:

> [S]hould the trial court . . . wish to provide a newly-competent defendant an opportunity to ratify his earlier [void] plea, a full and complete inquiry must be made by the court on that later occasion to determine the voluntariness of that ratification, the voluntariness of the plea itself, and further inquiry must once again be made of the now-competent defendant as to whether there is a proper factual basis for the plea.

390 F. Supp. at 389.

C. *Future State Proceedings*

We endorse Judge Duffy's suggestion, 430 F. Supp. at 884, that, in view of certain paranoidal letters he received from Suggs in March of 1977, appellee be re-examined for competency before repleading. *See* note 52 *supra.* If Suggs is found to be incompetent, as appears likely given his longstanding mental illness, now possibly exacerbated by almost ten years behind bars, then the state mental health authorities are, of course, authorized to take whatever measures are appropriate under Article 730 of the Criminal Procedure Law or Article 31 of the Mental Hygiene Law.

Judgment affirmed.

KAUFMAN, *Chief Judge* (concurring):

I concur in Judge Oakes's meticulous and well-reasoned opinion. I would merely add that his painstaking exposition of the unfortunate details of Suggs's "coming of age" points to an emerging and highly significant problem in the law, namely, the troubled relationship between the vagaries of psychiatric evaluation and the difficulties of judicial determinations of incompetence. At the time of Sugg's plea, before one could be deemed incompetent to stand trial in New York, a judicial finding was required that he was in "such a state of idiocy, imbecility or insanity as to be incapable of understanding the charges against him or the proceedings, or of making his defense . . . ." New York Code of Crim. Proc. §662-b(1) (McKinney Supp. 1970).

Of course, psychiatrists are invariably enlisted to aid in such determinations. Yet, psychiatry is at best an inexact science, if, indeed, it is a science, lacking the coherent set of proven underlying values necessary for ultimate decisions on knowledge or competence. It is suited, as it should be, to the diagnoses of illness or maladjustment for the purposes of treatment. Judges, on the other hand, while provided with a set of determinate values through the development of legal principles, simply lack the expertise to apply meaningful standards in individual cases. And, unfortunately, because of the imprecision of the norms in this area, much is lost in the translation from psychiatrist to judge or jury, between diagnosis and decision. This problem is even more striking where an individual is found not guilty by reason of insanity. There, the absence of a coherent psychiatric notion of volition and of workable legal standards results, it has been repeatedly claimed, in the administration of ad hoc justice.

Throughout his tortuous ten year history in the courts and in the psychiatric clinics, John Suggs was—and still is—a victim of our inability to deal adequately with this dilemma. It is clear from the record that his behavior is bizarre and destructive, and that he has never had much more than a tenuous grasp on reality. Perhaps Dr. Messinger's assessment of his condition as "emotionally unstable, with depressive and paranoid trends" is correct; perhaps Dr. Lubin's diagnosis of his condition of "schizophrenia" may be more accurate. Fortunately, we need not reassess the medical testimony, Judge Duffy, who considered Sugg's complete psychiatric history for the first time, was clearly correct in his decision to redetermine the issue of Suggs's competence at plea, and his findings have ample support in the record. Yet, one cannot help but have the gnawing uncertainty, in deciding after ten years that civil commitment proceedings might be appropriate, whether both judges and psychiatrists have led Suggs on a long day's journey into night.

Appendix B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-eight.

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. JAMES L. OAKES
HON. THOMAS J. MESKILL
Circuit Judges,

77-2053

JOHN SUGGS,
Petitioner-Appellee,

v.

J. EDWIN LAVALLEE, Superintendent,
Clinton State Correctional Facility,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

By Arthur Heller,
Deputy Clerk

Appendix C

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of March, one thousand nine hundred and seventy-eight.

Present:

Hon. Irving R. Kaufman
Chief Judge
Hon. James L. Oakes,
Hon. Thomas J. Meskill,
Circuit Judges.

77-2053

John Suggs,
Petitioner-Appellee,

v.

J. Edwin LaVallee, Superintendent,
Clinton State Correctional Facility,
Respondent-Appellant.

A petition for a rehearing having been filed herein by counsel for the respondent

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro
Clerk

Appendix D

Order of the Court of Appeals Denying Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of March, one thousand nine hundred and seventy-eight.

77-2053

JOHN SUGGS,
Petitioner-Appellee,

v.

J. EDWIN LAVALLEE, Superintendent,
Clinton State Correctional Facility,
Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent-appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

Chief Judge
IRVING R. KAUFMAN

Appendix E

Opinion of the Court of Appeals August 7, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1042—September Term, 1974

(Argued May 7, 1975 Decided August 7, 1975.)

Docket No. 75-2049

UNITED STATES OF AMERICA ex rel. JOHN SUGGS,
Petitioner-Appellee,

v.

J. EDWIN LA VALLEE,
Respondent-Appellant.

Before:

FEINBERG, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order entered in the Southern District of New York, Kevin T. Duffy, *District Judge,* on state prisoner's petition for a writ of habeas corpus, vacating his pleas of guilty and directing that the writ issue in sixty days unless the prisoner is permitted to replead in the state court within that time.

Vacated and remanded.

Appendix E

DAVID R. SPIEGEL, Asst. Atty. Gen. of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Atty. Gen., and Samuel A. Hirshowitz, First Asst. Atty. Gen., New York, N.Y., on the brief), *for Respondent-Appellant.*

JUDSON A. PARSONS, JR., *New York, N. Y.* (Robert J. Costello, New York, N.Y., on the brief), *for Petitioner-Appellee.*

TIMBERS, *Circuit Judge:*

The State of New York appeals from an order entered February 25, 1975 in the Southern District of New York, Kevin T. Duffy, *District Judge,* 390 F. Supp. 383, on a state prisoner's petition for a writ of habeas corpus, vacating his pleas of guilty and directing that the writ issue in sixty days unless the prisoner is permitted to replead in the state court within that time.

With the benefit of the hindsight that the district court did not have, we vacate its order and we remand the case for an evidentiary hearing—by either the state court or the district court, as the latter may determine—on the prisoner's competence at the time his guilty pleas were entered, in the light of two psychiatric reports which were not before the district court at the time the order now before us was entered.

In two indictments filed July 30, 1968, John Suggs was charged with various counts of rape, sodomy, robbery and possession of a weapon. The charges arose from two separate incidents of violence which took place in New York City on April 28 and May 24, 1968. He pleaded not guilty to all charges on *August 1, 1968.*

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On September 13, 1968, when he was 17 years of age and while represented by The Legal Aid Society, Suggs appeared before Justice Nunez in the New York Supreme Court. On this date he withdrew his pleas of not guilty and pleaded guilty to one count of rape and one count of robbery in satisfaction of both indictments. Before accepting Suggs' guilty pleas, Justice Nunez conducted an extensive voir dire examination of Suggs to determine whether he understood what he was pleading to, whether there was a factual basis for the pleas, and whether the pleas were voluntary. Suggs' responses indicated that he understood the charges, that there was a factual basis for his pleas and that he was pleading voluntarily. He admitted all of the alleged facts and even volunteered information.

During the course of the court's questioning, however, Suggs refused to admit that he felt any remorse for what he had done. *After* accepting his pleas on September 13, therefore, Justice Nunez ordered a psychiatric examination of Suggs for sentencing purposes. For aught that the record before us discloses, neither at that time nor at any time prior to the instant appeal was anyone who had anything to do with Suggs' case aware of a psychiatric report which was furnished to the New York Supreme Court by Dr. Emanuel Messinger under date of July 23, 1968 and which stated that Suggs was "without psychosis and of average intelligence".

Pursuant to Justice Nunez's order following his acceptance of the guilty pleas, Suggs was given a psychiatric examination. On October 21, 1968, the report of this examination was transmitted to the New York Supreme Court by Drs. Martin I. Lubin and Laszlo Kedar. They stated

that Suggs was a paranoid type schizophrenic and that he was "incapable of understanding the charge, proceedings or making his defense". Acting on this report, Justice Gold of the New York Supreme Court entered an order on November 6, 1968 finding Suggs "incapable of understanding the charge or proceedings against him, or of making his defense thereto" and committing him to the custody of the Commissioner of Mental Hygiene.

On April 4, 1969, after drug therapy, Suggs was declared competent to stand trial. He was returned for sentencing. At the request of Suggs' newly appointed counsel, he was reexamined. On May 20, 1969, Dr. Messinger, who had written the July 23, 1968 report to the court, reported again that Suggs was not psychotic.

On June 6, 1969, Suggs appeared for sentencing before Justice Schweitzer in the New York Supreme Court. Sentencing had been adjourned once to allow Suggs to withdraw his pleas of guilty. Two days before the hearing which was scheduled for that purpose, Suggs' counsel informed the court that Suggs wished to abandon his application to withdraw his pleas and would accept sentence. At the sentencing proceedings, however, Suggs again indicated that he wanted to withdraw his pleas. But when the court gave him an explicit opportunity to make such an application, he declined to do so. Suggs thereupon was sentenced to a term of imprisonment of five to fifteen years.

He appealed to the Appellate Division on the issue of his right to a competency hearing at the time of sentencing even though he had not requested one. His conviction was affirmed without opinion on October 13, 1970. *People* v. *Suggs*, 35 App. Div. 781, 314 N.Y.S.2d 981 (1st Dept. 1970).

On November 6, 1970, leave to appeal to the New York Court of Appeals was denied.

In the meanwhile, Suggs also had filed an application in the New York Supreme Court for a writ of error *coram nobis*, in which he again raised the issue of his right to a competency hearing at the time of sentencing. This petition was denied on August 18, 1970. No appeal was taken.

On October 13, 1972, acting pro se, Suggs filed the instant petition for a writ of habeas corpus in the Southern District of New York. He claimed, under *Pate* v. *Robinson*, 383 U.S. 375 (1966) (decided prior to his 1969 sentencing), that the state court should have ordered a hearing *sua sponte* on his competency to reaffirm his pleas of guilty. The district court appointed counsel to represent him.

On July 19, 1973, the petition for a writ of habeas corpus by stipulation was placed on the suspense calendar to allow Suggs to return to the state courts to raise the new issue of the sentencing court's alleged failure to conduct the inquiry on voluntariness claimed to be required by *Boykin* v. *Alabama*, 395 U.S. 238 (1969). *Boykin* was decided on June 2, 1969, four days before Suggs was sentenced in the instant case.

On December 6, 1973, Justice Sandifer, in the New York Supreme Court, filed an opinion which denied Suggs' motion to vacate his judgment of conviction based on his *Boykin* claim and which stated:

> "The thrust of defendant's argument is that at this point in the face of the defendant's categorical refusal to withdraw his plea in open court in the presence of counsel, that the court, sua sponte, should have set his plea aside for the sole purpose of inquiring of him

whether his pleas were 'intelligent and voluntary' (*Boykin* v. *Alabama, supra*) despite the fact that at the time his original pleas were taken (September 13, 1968), it is far from clear that the defendant was incompetent.

It will suffice to say that we do not read *Boykin* so as to require this procedure in this case. . . . Applying [the *Boykin*] standard to this case we find that the evidence is overwhelming that the defendant by his guilty pleas knowingly, intelligently and voluntarily waived his constitutional right against self-incrimination under the Fifth Amendment, his right to trial by jury . . ., and his right to confront his accusers . . . and that this motion is in all respects denied" (citations omitted).

On March 5, 1974, leave to appeal to the Appellate Division from Justice Sandifer's order was denied.

Following removal of the case from the suspense calendar in the district court, Judge Duffy filed an opinion on February 25, 1975 granting the relief stated above. The court's order vacating Suggs' pleas of guilty was based on the report by Drs. Lubin and Kedar dated October 21, 1968 which stated that Suggs was psychotic. The court concluded without an evidentiary hearing that the only possible inference was that Suggs was incompetent at the time of his pleas and that his pleas therefore were invalid under *Pate* v. *Robinson, supra*, and *McCarthy* v. *United States*, 394 U.S. 459 (1969). 390 F. Supp. at 387.[1]

1. Once the district court had concluded that Suggs' guilty pleas were invalid, it then considered whether the court which sentenced Suggs on June 6, 1969 had inquired sufficiently into the voluntariness of his pleas to fulfill the requirements of *Boykin* v. *Alabama, supra*, i.e. the claim which Justice Sandifer had rejected. It held that the minutes of the sentencing proceedings were "utterly inadequate to

(footnote continued on next page)

At the time of its decision, the district court did not have before it the two reports of psychiatric examinations of Suggs by Dr. Messinger dated July 23, 1968 and May 20, 1969, each of which stated that Suggs was not psychotic. These were not discovered by the State until April 1, 1975 when it searched the dead records file of the Psychiatric Clinic of the Supreme Court. This was after the State had filed its notice of the instant appeal. On April 15, 1975, we ordered that argument of the appeal be expedited and granted the State's motion to amend the record by including the two Messinger reports.

We believe that the report dated July 23, 1968 may well be of critical importance to the determination of Suggs' competence at the time of his pleas. In reporting that Suggs was not psychotic, it flatly contradicts the Lubin-Kedar report of October 21, 1968, made three months later. The two reports raise an issue of fact as to Suggs' competence when he pleaded guilty on September 13, 1968. If the district court had had the July 23, 1968 report, it undoubtedly would have held an evidentiary hearing on Suggs' petition before ruling on it.

In view of the fact that Suggs' petition has been pending in the district court since October 13, 1972 and the case already has had one trip to the state courts to allow Suggs to exhaust his state remedies, we think it is most unfortunate that Dr. Messinger's report was not located until April

make any finding of waiver of rights, pursuant to *Boykin*". 390 F.Supp. at 389. It also rejected the State's argument that Suggs had gratified his earlier plea by refusing to withdraw it when given the opportunity to do so by the sentencing court. In view of our disposition of the case, we find it unnecessary to reach these issues.

Nor do we reach Suggs' claim that the sentencing court should have held a competency hearing *sua sponte*. This claim was rejected by the district court, 390 F.Supp. at 389-90. It has not been pressed on appeal.

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1, 1975. But in view of the importance of this report to the factual issue involved, the only appropriate course open to us is to remand the case for an evidentiary hearing.

One of the puzzling aspects of this case is that it is not clear from the record whether the issue of Suggs' competency *at the time of his guilty pleas* actually has been presented to the state courts. His direct appeal and *coram nobis* proceeding appear to have raised the issue of his right to a competency hearing *at the time of sentencing*. His motion to vacate judgment before Justice Sandifer raised his *Boykin* claim. We suggest that the district court give consideration to affording the state court an opportunity initially to hold the evidentiary hearing which we find is required. See *Jackson* v. *Denno*, 378 U.S. 368, 393-96 (1964); *Iverson* v. *State of North Dakota*, 480 F.2d 414, 428 (8 Cir.), *cert. denied*, 414 U.S. 1044 (1973).

We leave to the discretion of the district court, however, whether the evidentiary hearing should be held initially by the state court or the district court. We have confidence in the district court's ability to balance the competing interests here involved: on the one hand, the congressional policy of requiring exhaustion of available state remedies; and on the other, the equally important policy of not exhausting state prisoners who seek to assert, their federal constitutional rights. In any event, we suggest that whichever court holds the evidentiary hearing should consider the advisability of taking testimony not only from the psychiatrists who examined Suggs but also from others who observed him during the critical period, including his lawyer at that time and the assistant district attorney who handled the case. *Iverson* v. *State of North Dakota, supra*, 480 F.2d at 427.

Vacated and remanded.

Appendix F

Opinion of the District Court
February 25, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4336

UNITED STATES OF AMERICA
ex rel. JOHN SUGGS,

Petitioner,

against

J. EDWIN LAVALLEE, Superintendent, Clinton State Correctional Facility, Dannemora, New York,

Respondent.

Appearances:

JUDSON A. PARSONS, JR., Esq.
Attorney for Petitioner

Hon. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Respondent
By: Stanley L. Kantor, Esq.
Deputy Asst. Attorney General
Of Counsel

Appendix F

KEVIN THOMAS DUFFY, D.J.

The petitioner, a state prisoner presently incarcerated in the Auburn Correctional Facility, makes application pursuant to Title 28, United States Code, Section 2254, for a writ of habeas corpus in order to secure a new trial, or, in the alternative, an evidentiary hearing, relating to the involuntary nature of his plea of guilty to the crimes of rape in the first degree and robbery in the first degree, in Supreme Court, New York County, for which he was sentenced on June 6, 1969, to two concurrent indeterminate terms of five to fifteen years imprisonment.

I find that petitioner has complied with the requirement of 28 U.S.C. 2254(b) that he first exhaust state court remedies before presenting his claims to the federal courts.

His initial appeal, limited to the issue of his right to a competency hearing at the time of sentencing, was denied by the Appellate Division, *People* v. *Suggs*, 35 App. Div.2d 781 (1st Dept. 1970), with leave to appeal to the New York Court of Appeals denied on November 6, 1970.

He also filed an application for a writ of error *coram nobis* in Supreme Court, New York County, again raising the issue of his right to a competency hearing at the time of sentencing. This petition was denied in August 1970, and no appeal was taken therefrom.

Shortly after the institution of his habeas petition, counsel was assigned by this Court and the Court suspended consideration on the merits until such time as petitioner returned to the state courts to exhaust on the issue of the sentencing court's failure to afford the colloquy on voluntariness mandated by *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

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Accordingly, petitioner filed a motion to vacate the judgment in Supreme Court, New York County, which was denied on December 6, 1973, with leave to appeal to the Appellate Division denied on March 5, 1974.

Thus, there has now been a proper exhaustion of state court remedies, 28 U.S.C. 2254(b); both procedurally, *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); and as to the specific subject matter raised in the petition, *Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972).

The basic question presented is whether petitioner was deprived of due process of law by virtue of the sentencing court's failure to inquire into the voluntariness of his original guilty plea, in light of his having been found incompetent immediately after his initial plea.

Petitioner was originally charged in an eighteen-count indictment with various counts of rape in the first degree, sodomy in the first degree, robbery in the first degree, and possession of a weapon. A second indictment charged him with additional counts of robbery.

In spite of his relative youth (age 17) and lack of a prior criminal record, he was denied Youthful Offender Status on August 1, 1968, and appeared in Supreme Court, New York County, on September 13, 1968, in order to plead to the indictment. Petitioner, represented by the Legal Aid Society, withdrew his prior plea of not guilty and offered to plead guilty to one count of rape, first degree, and one count of robbery, first degree, in full satisfaction of the indictments. The prosecution recommended acceptance of the proffered plea.

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Before accepting the plea, the court entered into a colloquy with petitioner as to his understanding of the plea, and as to whether or not there was a factual basis for the plea. During the course of this colloquy, petitioner responded affirmatively when asked whether he had heard the facts of the crimes as related by the District Attorney and he admitted them. He also stated that he had consulted with his attorney. The court at that time asked him whether his guilty plea was voluntary and whether threats or promises were made to induce him to plead. He responded appropriately.

It is to be noted, however, that the court on that occasion made no inquiry whatsoever into whether petitioner understood what specific constitutional rights he would be waiving by pleading guilty. Moreover, there is no indication whatever on the face of the plea minutes that petitioner was ever informed of the potential maximum sentence which might be imposed upon his guilty plea, or of the possibility that he would have to serve a minimum sentence before being eligible for parole. However, in light of this Court's disposition, *infra*, it is unnecessary to rule upon whether petitioner fully understood the consequences of the plea at that time.

Upon satisfying itself as to the plea's voluntariness, the court thereupon began to inquire into whether petitioner felt any remorse for his acts. After engaging in a bizarre colloquy, reproduced in the Appendix, *infra*, the court *sua sponte*, with the consent of petitioner's counsel, ordered him to Bellevue Psychiatric Hospital for a psychiatric examination and report, pursuant to Sec. 658, *et seq.*, of the

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then-Code of Criminal Procedure (now Article 730, Criminal Procedure Law).

However, the court still accepted petitioner's guilty plea and set October 31, 1968, for sentencing.

Petitioner was committed forthwith to Bellevue and a report to the court was completed on October 21, 1968. The report revealed that petitioner had a long history of behavior problems, including residence at Wiltwyck Treatment Center and Hampton State Training School, and that "His history of behavior reveals that he has characteristically reacted to feelings of persecution by retaliation." Diagnosing petitioner as suffering from "Schizophrenia, Paranoid Type", the two qualified psychiatrists who examined him found him to be "in such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense." *Cf.*, Sec. 658, C.C.P.

Pursuant to Sec. 662-b, C.C.P., the court, after a hearing, found petitioner incompetent to stand trial and committed him to the custody of the Commissioner of Mental Hygiene on November 6, 1968. On November 15, 1968, petitioner was committed to Matteawan State Hospital.

On April 4, 1969, the Superintendent of Matteawan filed a report with the court, certifying that petitioner was "no longer in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or making his defense thereto." The Superintendent's report, containing a history of petitioner's psychiatric background and progress, diagnosed his condition as Psychosis with Antisocial Personality, Paranoid and Reactive Features. The report stated that at a recent staff presentation, petitioner was attentive and cooperative and was

able to give a coherent and relevant account of the events leading to his arrest.

Upon the basis of that report alone petitioner was certified as competent on April 9, 1969, and he was thereupon returned to court for sentencing.

On June 6, 1969, petitioner appeared with newly appointed counsel for sentencing. Upon being asked by the court whether there was any legal cause why judgment should not be pronounced at that time, petitioner replied that at the time of his original plea, he wasn't capable of understanding the case.

The court then reiterated to petitioner that it had previously adjourned the sentencing in order to give petitioner's counsel an opportunity to make any applications he deemed advisable with regard to withdrawing his plea. The court reminded petitioner that his attorney had informed the court earlier that week that petitioner did not wish to withdraw his plea. The court then inquired of defendant personally, whether he wished to withdraw his plea or proceed with sentencing. Petitioner asked to be sentenced and indicated that he specifically did not wish to withdraw his plea. Thereupon, making no further inquiry into the voluntariness or factual basis for the plea, the court sentenced petitioner to a term of five to fifteen years.

Petitioner argues that under the circumstances of the present case, the fact that his initial guilty plea was entered at a time when he was incompetent voids the actual plea and all proceedings relating thereto under the rule of *Pate* v. *Robinson*, 383 U.S. 375 (1966) and *McCarthy* v. *United States*, 394 U.S. 459 (1969), and that, furthermore, the actual sentencing was improper because no inquiry was made as to whether petitioner's previous void plea (or his

decision not to move to withdraw it) was voluntary, as required by *Boykin* v. *Alabama*, 395 U.S. 238 (1969), decided just four days before sentence was imposed.

Such an argument is indeed substantial, and under the exigent circumstances of this case, I am constrained to sustain these contentions.

It is clear that the conviction of a defendant while he is legally incompetent violates due process. *Pate* v. *Robinson, supra; Bishop* v. *United States*, 350 U.S. 961 (1956). Similarly, it is equally clear that in order for a guilty plea to be valid, such a plea must be knowing and voluntary. *Kercheval* v. *United States*, 274 U.S. 200 (1927); *McCarthy* v. *United States, supra; United States ex rel. Leeson* v. *Damon*, 496 F.2d 718, 721 (2d Cir. 1974).

The appropriate standard with regard to a guilty plea is that:

> ". . . [I]t must be an 'intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy* v. *United States, supra*, 394 U.S. at 466.

The application of such a standard to the plea of a defendant who is declared incompetent immediately after having been remanded for psychiatric examination upon the basis of his colloquy with the court at the time of the plea manifestly negates the validity of any such plea. As the Supreme Court stated in an analogous situation:

> ". . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently

> 'waive' his right to have the court determine his incapacity to stand trial." *Pate* v. *Robinson, supra*, 383 U.S. at 384.

Respondent's sole answer to this argument is to attempt to persuade the court that no proof has been adduced that petitioner actually was incompetent at the time of his initial plea, and that, given the time delay between the date of the plea and the psychiatric report—five weeks—there is no clear-cut evidence that petitioner was actually incompetent on the day of the plea.

Such an argument is transparent sophistry. Petitioner was remanded for examination because of his bizarre responses at the plea itself. Moreover, the record reveals that he was sent to Bellevue on the very date of the plea. The date of the psychiatric report to the court is merely the date upon which the psychiatrists reported their findings, not the date of their examinations.

Such a psychiatric report, and its subsequent ratification by the court, attesting to a defendant's incompetency, must be interpreted as conclusively invalidating any plea that constitutes a voluntary relinquishment of rights made at a time when a defendant is suffering under such a disability. *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953); *United States ex rel. Kaye* v. *Zelker*, 355 F.Supp. 1002 (S.D.N.Y. 1972), *aff'd*, 474 F.2d 1336 (2d Cir. 1973).

Thus, as any plea that is taken by a defendant at a time when he is incompetent must be treated as a nullity, as is conceded in this case by the respondent, the Court must next consider whether the sentencing court's attempted ratification of the previous guilty plea sufficiently delved

into the question of the ratification's voluntariness to meet the standards imposed by *Boykin* v. *Alabama, supra*.

The Supreme Court in *Boykin* specifically enumerated that among the rights waived by a defendant who pleads guilty are the constitutional rights to a jury trial, confrontation by his accusors, and the privilege against self-incrimination. 395 U.S. at 243. The Court stated that waiver cannot be presumed from a silent record, holding that the prerequisites of a valid waiver must appear on the record:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.*, at 242.

The question of how explicitly a defendant must be shown to have waived these rights is, however, not susceptible of clear-cut definition. While several circuits have held that the record need not reflect that the waiver of the three constitutional rights enumerated in *Boykin* need be explicit, *Wade* v. *Coiner*, 468 F.2d 1059 (4th Cir. 1972); *Winters* v. *Cook*, 489 F.2d 174 (5th Cir. 1973) (en banc); *Todd* v. *Lockhart*, 490 F.2d 626 (8th Cir. 1974); other circuits have held that there must be an affirmative showing of explicit waiver, *Coleman* v. *Burnett*, 477 F.2d 1187 (D.C. Cir. 1973); *Sieling* v. *Eyman*, 478 F.2d 211 (9th Cir. 1973); *Moore* v. *Anderson*, 474 F.2d 1118 (10th Cir. 1973).

While this Circuit has not yet specifically ruled on the question, it has seemingly indicated sympathy with the latter interpretation in *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092, 1102 (2d Cir. 1972), *cert. denied*, 410

U.S. 945 (1973), wherein the Court stated in dictum that the states would appear to have imposed upon them the requirements by demonstrating voluntariness consonant with Rule 11, F.R.Cr.P. by *Boykin*.* However, the Court declined to so rule on that occasion on the ground that the guilty plea in question predated *Boykin*, and the Circuit had previously held it to be non-retroactive. *United States ex rel. Rogers* v. *Adams*, 435 F.2d 1372 (2d Cir. 1970), *cert. denied*, 404 U.S. 834 (1971).

The facts of the instant case throw the question of non-retroactivity of *Boykin* into sharp relief, for, while the initial plea occurred some nine months before that decision, the sentencing took place four days *afterward*. Thus, given the previous incompetency of petitioner, rendering his guilty plea a nullity, this Court must apply *Boykin* standards in determining whether the purported ratification at sentencing of the earlier plea sufficiently rehabilitated it in order for it to remain valid.

Inspection of the sentencing minutes reveals a complete absence of any meaningful inquiry into the voluntariness of petitioner's earlier plea. The sentencing court's sole inquiry was directed to the question of whether petitioner wished to withdraw his earlier plea. Upon the defendant's acquiescence in the earlier plea, the court proceeded without any further inquiry of its own into the original plea's voluntariness or the voluntariness of a now-competent defendant's ratification of a plea made when he was incompetent. No inquiry whatever was made of petitioner at any time during which he was competent as to whether any

* *Cf., United States ex rel. Hill* v. *Ternullo*, —— F.2d ——, (74-2351, 2d Cir. 2/10/75) at 1756, fn.1.

promises had been made to him, whether he had been coerced, whether he was acting under his own free will either with respect to his invalid plea or his decision not to withdraw it.

Moreover, no inquiry was made of the defendant, now that he was competent, as to whether there was a proper factual basis for his plea. *United States ex rel. Dunn* v. *Casscles*, 494 F.2d 397 (2d Cir. 1974); *McCarthy* v. *U.S.*, *supra*.

Respondent argues that petitioner's waiver of the opportunity to make a motion to withdraw his plea at the time of sentencing operates as both a ratification of the earlier plea and a waiver of his objections to that plea's voluntariness, citing *United States ex rel. Callahan* v. *Follette*, 418 F.2d 903 (2d Cir. 1969), *cert. denied*, 400 U.S. 840 (1970).

Such an argument is plainly untenable upon the facts of this case. *Callahan* concerned a guilty plea, valid on its face, that was being attacked upon the grounds of unfulfilled promises by either the court or the prosecution, a situation in which the defendant clearly has the burden of proof. Callahan was held to have waived any objection to his plea by his failure to take the opportunity afforded by the court for a formal motion and determination of his request for withdrawal.

Furthermore, respondent's suggestion that the 1968 plea minutes in this case be read in conjunction with the 1969 sentencing minutes clearly flies in the face of both *Pate* v. *Robinson*, *supra*, and *McCarthy* v. *United States*, *supra*.

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It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to stand trial, such a plea must be considered null and void, and upon the attainment of competency, he must be given an opportunity to re-plead to the charges.

Furthermore, should the trial court, alternatively, wish to provide a newly-competent defendant an opportunity to ratify his earlier plea, a full and complete inquiry must be made by the court on that later occasion to determine the voluntariness of that ratification, the voluntariness of the plea itself, and further inquiry must once again be made of the now-competent defendant as to whether there is a proper factual basis for the plea.

Applying these principles to the instant facts, it is manifest that no such inquiry as to the voluntariness of the ratification, the plea itself, or any factual inquiry was made of the defendant at the time of sentencing. Thus, if the 1968 plea is deemed a nullity by virtue of defendant's incompetence, the court must look to the sentencing minutes, which are utterly inadequate to make any finding of waiver of rights, pursuant to *Boykin*.

In attempting to fashion the appropriate remedy in this case, the Court is not unmindful of the fact that in most cases a hearing may be held by the District Court in an attempt to cure the defects of the plea. *U.S. ex rel. Leeson* v. *Damon*, *supra*; *Green* v. *Wingo*, 454 F.2d 52, 54 (6th Cir. 1972).

However, a hearing is not always mandated, and there is authority for the Court to hold that an inadequate record alone may justify relief from a guilty plea, *Stinson* v.

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Turner, 473 F.2d 913 (10th Cir. 1973); *Perry* v. *Crouse*, 429 F.2d 1083 (10th Cir. 1970). This would appear to be the wiser course in this case, dealing as we are with a void guilty plea and a grossly inadequate post-*Boykin* attempted ratification of that plea. The holding of a hearing in this case in order to flesh out a virtually non-existent record would be an exercise in futility. Rather, petitioner should be given the opportunity, albeit belated, to properly re-plead to the indictments in question.

In light of the foregoing disposition, it is unnecessary for me to decide whether, under any and all circumstances, the failure of a sentencing court to hold a competency hearing, *sua sponte*, where none has been requested, and where the record at the time of sentencing did not indicate that the petitioner was manifesting any psychiatric symptomology, violated due process.

Suffice it to say, *Pate* v. *Robinson*, *supra*, does not mandate a competency hearing regardless of the evidence and whether or not the defendant requests one. *United States ex rel. Evans* v. *LaVallee*, 446 F.2d 782 (2d Cir. 1971); *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105 (2d Cir.), *cert. denied*, 408 U.S. 927; *United States ex rel. Curtis* v. *Zelker*, *supra*.

Upon careful scrutiny of this record as well as petitioner's failure to particularize in what way he was prejudiced by this omission, the sentencing court's refusal to hold a competency hearing, *sua sponte* was well within the proper exercise of its discretion.

Accordingly, petitioner's plea of guilty is vacated, and the writ of habeas corpus shall issue sixty days from the

date of this opinion, unless within that time petitioner is allowed to re-plead in the State court upon the indictments in question.

The Court wishes to express its appreciation to Judson A. Parson, Jr., Esq., assigned counsel, for his assistance in this case.

KEVIN THOMAS DUFFY

U. S. D. J.

Dated: New York, New York
February 25, 1975.

APPENDIX

The Court: You are not sorry at all that you did any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.

The Court: No matter what you do?

The Defendant: No matter what I do. (Plea minutes, pp. 17-18).

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

The Court: What happened then?

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The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother. (*Id.* at pp. 19-20).

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be—whom are you mad at?

The Defendant: No one. (*Id.* at p. 21).

Appendix G

Opinion of the District Court
September 2, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4336

UNITED STATES OF AMERICA
ex rel. JOHN SUGGS,

Petitioner,

against

J. EDWIN LAVALLEE, Superintendent, Clinton State Correctional Facility, Dannemora, New York,

Respondent.

Appearances:

JUDSON A. PARSONS, JR., Esq.
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Both of the offices of

Honorable LOUIS J. LEFKOWITZ,
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Attorneys for Respondent

Appendix G

KEVIN THOMAS DUFFY, D.J.

This case is before this Court on remand from the Second Circuit which vacated my prior order granting a writ of habeas corpus. The full facts of the case will be found at 390 F. Supp. 383 (S.D.N.Y. 1975); and in the opinion of the Court of Appeals, —— F.2d —— (2d Cir., filed August 7, 1975).

Basically, Suggs is in custody of New York State officials pursuant to a judgment of conviction and sentence after his return from Matteawan State Hospital for the Criminally Insane and plea of guilty which he submitted immediately prior to being committed for hospitalization. It was the holding of this Court that the plea must be either reopened or at least reaffirmed before sentence could be imposed.

On appeal, the Assistant Attorneys General listed above requested leave to expand the appellate record to include two psychiatric reports which directly contradict the report upon which this commitment to Matteawan State Hospital for the Criminally Insane was imposed. Under these circumstances, the Court of Appeals of this circuit has directed that a hearing be held and left to my discretion where to hold such a hearing.

At such a hearing it will be necessary for Mr. Justice Nunez to be called as a witness to ascertain whether he had knowledge of the facts and circumstances surrounding the psychiatric reports which were not revealed to me until the opinion of the Court of Appeals has been filed.

Of course, if Mr. Justice Nunez had such reports, he would have held a hearing before committing the man to

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psychiatric care. There was no record before this Court of such a hearing. If Mr. Justice Nunez had knowledge of such reports without holding a hearing and making independent findings and yet committed the man, a serious constitutional question may be raised which up to this point has been unknown to any of the parties to the matter. *See Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972); *cf. O'Connor* v. *Donaldson*, 43 U.S.L.W. 4929 (June 26, 1975).

The second group of witnesses that must be called include the Assistant Attorneys General who handled this matter, particularly with respect to the existence or non-existence of the records of such a hearing and commitment. It would be a travesty* if they were not called, and by further omission to state material facts the matter would have to be considered by some court.

Third, Mr. Justice Sandifer, who denied petitioner's motion to vacate judgment, must also be called as a witness to find out whether he had knowledge of these reports and what action, if any, he took in connection therewith. In view of the fact of his lengthy opinion on the first remand from this Court, which contains absolutely no mention of the reports, it would appear that he had no knowledge of them. Of course, the parties may wish to call other witnesses.

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* It is heart-sickening for all courts to be faced with "newly discovered evidence" after a full and fair hearing, particularly where the evidence apparently could have been obtained before the hearing. It is particularly annoying both to trial and appellate judges that the record was expanded upon appeal to include such without even the appellant's requesting remand to the trial court to avoid such a waste of judicial time.

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Since the necessary witnesses will include Justices of the Supreme Court, it appears to me that the proper forum for taking their testimony would be the Supreme Court of the State of New York. Accordingly, the matter is remanded to that Court with the request that appropriate Administrative Justice assign it for hearing. It would be appreciated if the state court action could be completed within 90 days.

The remand is so ordered.

/s/ Kevin Thomas Duffy
U. S. D. J.

Dated: New York, New York
September 2, 1975.

Appendix H

Opinion of the District Court
November 16, 1976

UNITED STATES DISTRICT COURT

Southern District of New York

72 Civ. 4336

United States of America
ex rel. John Suggs,

Petitioner,

against

J. Edwin LaVallee, Superintendent, Clinton State Correctional Facility, Dannemora, New York,

Respondent.

Appearances:

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Attorney for Petitioner

By: John E. Leo, Esq.
Of Counsel

Hon. Robert M. Morgenthau
District Attorney
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By: Peter L. Zimroth, Esq.
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Of Counsel

Appendix II

KEVIN THOMAS DUFFY, D.J.

This case is once more before this Court, after having been remanded to State court for an evidentiary hearing. The remand was ordered in light of the sudden appearance of two psychiatric reports which were produced by the State respondents only on appeal from my order vacating petitioner's guilty plea on the ground of incompetence and granting a writ of habeas corpus unless petitioner reaffirmed his plea in State court. The facts surrounding his incarceration are detailed in my opinion of February 25, 1975, 390 F.Supp. 383 (S.D.N.Y. 1975) and in the opinion of the Court of Appeals, 523 F.2d 539 (2d Cir. 1975).

On September 13, 1968, petitioner Suggs pleaded guilty to one count of rape and one count of robbery before Justice Nunez of the State Supreme Court, New York County, in satisfaction of two indictments filed July 30, 1968, charging petitioner with various counts of rape, sodomy, robbery and possession of a weapon. As a result of answers given by Suggs to extensive questioning by the court, he was ordered to Bellevue Psychiatric Hospital for a psychiatric examination and report. His plea, however, was accepted and a date was set for sentencing.

A psychiatric report was completed and sent to the court by Drs. Martin I. Lubin and Laszlo Kedar on October 21, 1968, indicating that Suggs was a paranoid-type schizophrenic, who was "incapable of understanding the charge, proceedings or making his defense." Pursuant to Section 662 of the then-Code of Criminal Procedure, now contained in Article 730 of the Criminal Procedure Law, Suggs was committed to the custody of the Commissioner of Mental

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Hygiene on November 6, 1968, by order of Justice Gold after a hearing, and was committed to Matteawan State Hospital for the Criminally Insane on November 15, 1968. On April 9, 1969, Suggs was certified as competent and returned to the court for sentencing, which was imposed on June 6, 1969.

My decision granting habeas corpus relief was based in part on the Lubin-Kedar report of October 21, 1968, which stated that petitioner was psychotic at that time and formed the basis of an inference that he was incompetent at the time his plea was taken. This report was the only available psychiatric report in the record before me. On appeal, however, the State requested leave to expand the record (instead of requesting remand to me) to include two psychiatric reports dated July 23, 1968 and May 20, 1969 prepared by Dr. Emanuel Messinger, which stated that Suggs was not psychotic. In so finding, they flatly contradicted the reports upon which petitioner's hospitalization, and my conclusions of February 25, 1975, were primarily based. In light of these newly discovered reports, the Court of Appeals directed that an evidentiary hearing be held, leaving the forum to my discretion. 523 F.2d 539 (2d Cir. 1975). Since necessary witnesses included Justices of the State Supreme Court, I requested from the State court findings concerning knowledge of the existence of the Messinger reports as bearing on the validity of Sugg's plea. 400 F.Supp. 1366 (S.D.N.Y. 1975). The State court hearing, however, did not focus on the lack of awareness of the reports; instead, based on the evidence adduced, Judge Melia concluded that petitioner was com-

petent at the time his plea was taken and that petitioner had ratified the plea at the time of sentencing.

Petitioner now asserts that he is entitled to a writ of habeas corpus notwithstanding this State court determination, contending that the guilty plea should be set aside since he was incompetent at the time the plea was entered, and, in any event, the failure to supply his defense counsel with the Messinger report of July 23, 1968 violated his right to due process. Alternatively, he seeks a full evidentiary hearing in this Court. The State respondent has cross-moved to dismiss the proceedings for failure to exhaust State remedies.

The State's contention that petitioner's present relief lies in a direct appeal of Judge Melia's finding in the State appellate system is meaningless at this stage of the proceedings. The issue of petitioner's competency at the time of plea has already been argued before a State appellate court in a *coram nobis* petition which was denied in 1973.* The Messinger report of July 23, 1968, which is part and parcel of that issue, was produced some seven years after the plea was taken, after this Court had ruled once on petitioner's case and an appeal was pending from that ruling, and after petitioner had been forced to return for a further series of State proceedings, including the above mentioned appeal. To seek to require a further appeal with its consequent delay is an intolerable request which

* Although the Court of Appeals noted that it was unclear whether the issue of petitioner's competency at the time of his guilty plea had ever been presented to the State courts, 523 F.2d 539, 543 (2d Cir. 1975), it is clear that the question was raised in petitioner's second *coram nobis* petition which was omitted from the appellate record. (Ex. G to Affidavit in Support of Petitioner's Motion.)

flies in the face of the "important policy of not exhausing state prisoners who seek to assert their federal constitutional rights." *United States ex rel. Suggs* v. *LaVallee*, 523 F.2d 539, 543 (2d Cir. 1975). Indeed, petitioner, at this stage has done everything possible and appropriate.

In any event, it is clear from the record that I referred the hearing to State court not out of exhaustion considerations, but rather out of respect for the convenience of the Justices in the State system, whose testimony was essential. 400 F. Supp. 1366, 1367 (S.D.N.Y. 1975). It was well within my discretion to ignore this accommodation and hold the hearing myself. The fact that I might disagree with the result obtained at the hearing does not reduce my respect for the State judiciary. The making of this motion, unfortunately, causes me to comment on the possible absence of what I feel to be appropriate respect for both this Court and the State judiciary on the part of the State respondent or his counsel.

Petitioner's motion to summarily set aside his guilty plea is also denied. The question of petitioner's competence at the time of his plea on the record as it now stands presents a question of fact which is incapable of summary resolution. The Messinger report of July 23, 1968 indicated that Suggs was free of psychosis; it did not deal with the issue of his competence. Notwithstanding this fact, petitioner argues that it raised substantial questions regarding his mental ability and stability, and had it been available to his defense counsel, a complete pre-plea examination establishing his incompetence would have been requested. Petitioner urges that *Brady* v. *Maryland*,

373 U.S. 83 (1963) applies to this situation, and that the supression of evidence favorable to Suggs was a violation of due process. This contention is somewhat tenuous. It cannot be said that the Messinger report was so favorable to Sugg's position as to be tantamount to an exculpatory statement; indeed, the Court of Appeals, in vacating my order and remanding the case for a hearing in light of the production of this report, implied that, at least in its view, the report represented some indicia of competence. *See* 523 F.2d 539, 542 (2d Cir. 1975). Additionally, despite the inexcusable failure of the State to produce this report at an earlier time, it is questionable whether the report was suppressed within the meaning of *Brady*.

Petitioner is, however, entitled to a federal hearing on the issues presented. I remanded the case to State court for the mere taking of testimony to determine whether those involved with the case had knowledge of the Messinger reports. Judge Melia's finding of Suggs' competency at the time the plea was taken and subsequent ratification of the plea at the time of sentencing went far beyond this narrow matter referred for resolution. Indeed, the issue concerning ratification of the plea at sentencing had previously been disposed of by my opinion of February 25, 1975, in which I determined that no valid ratification had occurred and that the inquiry into the voluntariness of the plea was insufficient under the standards of *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Moreover, certain of the assumptions upon which Judge Melia's determination was based contradict the record. Although Judge Melia suggests that the examination ordered by Justice Nunez following acceptance of the plea was for sentencing purposes only, the stipulation relating to Justice Nunez's testimony states in no uncertain terms that such examination was not just for the purpose of sentencing, but "for all purposes, including a determination of whether the defendant was competent to be tried." Judge Melia also asserts that the "bizarre behavior at the time of plea" to which my February 25 opinion referred "apparently relates to defendant's assertion that he was not sorry for what he had done." Yet even a cursory glance at the plea minutes indicates that it was the reason given by Suggs as to why he was not sorry, and not the lack of remorse itself, which was unusual. This is evidenced by the following excerpt from those minutes:

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you your mother or your sister?

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The Defendant: My mother. (Plea minutes, pp. 19-20).

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be—whom are you mad at?

The Defendant: No one. (*Id.* at 20, 21).

Even if the hearing before Judge Melia were viewed as a full blown State proceeding, the factual findings of which are entitled to a presumption of correction on a federal habeas corpus petition, *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973), petitioner would still have the right to a federal evidentiary hearing since the merits of the factual dispute were not fully resolved in the State court hearing. 28 U.S.C. §2254(d)(1). When I requested the hearing to be held in State court, I named certain witnesses whose testimony appeared necessary; these suggestions were not exhaustive. Indeed, it is clear now that it was imperative to take the testimony of Justice Gold, who concluded that Suggs was incompetent after consulting the Lubin-Kedar report and holding a hearing, and who entered an order which caused Suggs to be transferred from Bellevue to Matteawan to be hospitalized: His testimony was not taken. This glaring omission renders the State court record incomplete for the issue presented by the later appearing Messinger report could not have been adequately resolved without some indication of Justice Gold's knowledge or lack of knowledge of the existence of the report at the time of his findings.

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In determining that a hearing on the competency issue must be held, I am not unmindful of the dim view taken by the Supreme Court of *nunc pro tunc* determinations of competency in situations where ambiguities exist regarding the legal significance of psychiatric evidence in the absence of a contemporaneous competency determination. *See, e.g., Pate* v. *Robinson*, 383 U.S. 375 (1966); *Dusky* v. *United States*, 362 U.S. 402 (1960); *Sandridge* v. *United States*, 356 U.S. 239 (1958). However, because the Court of Appeals has called upon me to cause this issue to be retroactively litigated, I am bound by that Court's determination of the procedural posture that this case must assume.

Both petitioner's motion for summary judgment and respondent's motion to dismiss are denied. The matter will be set down for an evidentiary hearing.

So Ordered.

/s/ Kevin Thomas Duffy

U. S. D. J.

Dated: New York, New York
November 16, 1976.

Appendix I

Opinion of the District Court
April 5, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4336

UNITED STATES OF AMERICA
ex rel. JOHN SUGGS,

Petitioner,

against

J. EDWIN LAVALLEE, Superintendent, Clinton State Correctional Facility, Dannemora, New York,

Respondent.

Appearances:

JUDSON A. PARSONS, JR., Esq.
Attorney for Petitioner

By: Christopher Kende, Esq.
Of Counsel

Honorable ROBERT M. MORGENTHAU
District Attorney, New York County
Attorney for Respondent

By: Henry Steinglass, Esq.
Robert Seewald, Esq.
Assistant District Attorneys
Of Counsel

Appendix I

KEVIN THOMAS DUFFY, D.J.

After a long and somewhat tortured history of judicial consideration, this habeas corpus proceeding has culminated in an evidentiary hearing on the issue of petitioner Suggs' competence at the time he entered guilty pleas to one count each of rape and robbery in state court. Both the circumstances of Suggs' incarceration and the procedural route taken by his petition are detailed in my opinions of February 25, 1975, 390 F.Supp. 383 (S.D.N.Y. 1975), September 3, 1975, 400 F.Supp. 1366 (S.D.N.Y. 1975), and November 16, 1976, 422 F.Supp. 1042 (S.D.N.Y. 1976), and in the opinion of the Court of Appeals of August 7, 1975, 523 F.2d 539 (2d Cir. 1975).

Simply stated, Suggs was convicted and sentenced to concurrent five to fifteen year terms of imprisonment on the basis of guilty pleas entered before Justice Nunez of the State Supreme Court, New York County, on September 13, 1968. Immediately following the acceptance of the pleas, as a result of post-plea statements made by Suggs, Justice Nunez ordered Suggs to Bellevue Psychiatric Hospital for a psychiatric examination and report. This report, dated October 21, 1968, and prepared by Drs. Martin I. Lubin and Laszlo Kedar, diagnosed Suggs as a paranoid type schizophrenic, "in such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense."

On November 6, 1968, on the basis of this report, and with the consent of the parties, Justice Gold committed Suggs to Matteawan State Hospital for the Criminally Insane, where petitioner remained until he was declared

competent on April 4, 1969. On June 6, 1969, sentence was imposed by Justice Schweitzer based solely on the petitioner's guilty plea of September 13, 1968.

After Suggs attempted various unsuccessful challenges to his conviction through state appellate and post-conviction proceedings, I granted federal habeas corpus relief, directing that the guilty pleas be reopened or reaffirmed before sentence could be imposed. On the basis of the record before me, I determined that Suggs was incompetent at the time of his pleas, which condition rendered the pleas void; that any attempted ratification of the pleas at sentencing failed, and that no effective waiver of rights occurred at sentencing as a result of an inadequate inquiry into the voluntariness of the pleas under *Boykin* v. *Alabama*, 395 U.S. 238 (1969), decided four days before Suggs was sentenced.

After the State respondent filed its notice of appeal from my order, two psychiatric reports dated July 23, 1968 and May 20, 1969 were discovered in the dead records file of the State Supreme Court's Psychiatric Clinic. These reports, prepared by Dr. Emanuel Messinger, stated that Suggs was not psychotic, thereby flatly contradicting the only psychiatric report theretofore in the record. In light of these eleventh hour reports, the Court of Appeals remanded the case for an evidentiary hearing,[1] leaving the forum to my discretion. For the convenience of the Justices of the State Supreme Court, whose testimony was essential, I requested that the hearing be held in state court.

1. Because of the remand, the Court of Appeals found it unnecessary to address the ratification and *Boykin* issues. My inquiry at this juncture is limited to Suggs' competency at the time of the pleas; the remaining issues are fully explored in 390 F.Supp. at 388-89.

However, for reasons detailed in my opinion of November 16, 1976, 422 F.Supp. 1042, the determination of Justice Melia, before whom testimony was taken, was set aside and a federal evidentiary hearing was ordered and subsequently held before me, on the issue of Suggs' competence at the time his guilty pleas were taken. This opinion constitutes my findings of fact and conclusions of law on the issue pursuant to Rule 52(a), F.R.Civ.P.

My consideration of the weight to be accorded the Messinger reports in determining Suggs' competency on September 13, 1968, the day of his guilty pleas, begins with the circumstances surrounding their preparation. On July 15, 1968, after petitioner had been arrested and was being held in custody, the Probation Department in the Youthful Offender Part of the State Supreme Court, New York County, requested that Court's Psychiatric Clinic to conduct a preliminary examination of Suggs. Apparently, this was done as part of a routine pre-pleading investigation of defendants such as Suggs, then 17 years old, to determine whether youthful offender treatment would be appropriate.[2] It was pursuant to this request that Dr. Emanuel Messinger, the psychiatrist-in-charge, examined petitioner and prepared the written report of July 23, 1968, stating that petitioner was "without psychosis" and describing Suggs' personality classification "as that of the Pathologic Personality Group, Emotionally Unstable Type, with depressive and paranoid trends." The report also quoted from the following notation, among others, of Dr. Suessmilch, the psychologist who tested Suggs:

2. Petitioner was subsequently disapproved for Youthful Offender Status by Justice Tierney.

> Although this defendant refused to cooperate on most of the Rorschack, such projective material as we have does not suggest a true thinking disorder, nor a psychosis. He impresses us as wilful, defensive, hostile, negativistic, paranoid and antisocial. We would classify him as a narcissistic behavior disorder of extreme degree. A poor prognosis is quite likely.

The usual procedure at that time was for copies of such psychiatric reports to be sent to the Probation Department and to the court. However, the plea minutes indicate that when Justice Nunez inquired whether Suggs had undergone a psychiatric examination, the court clerk replied that there was no record indicating so.[3]

It is clear that, despite Suggs' assertion at the plea hearing that he was examined "right downstairs," Justice Nunez was unaware of the Messinger report.[4] Donald Tucker, petitioner's assigned counsel, was likewise uninformed of the examination and report. Even though the testimony indicated that copies of such reports were not usually sent to defense counsel, John Collins, the Assistant District Attorney handling Suggs' pleas, testified before Justice Melia that consent of the defendant and counsel would have to be obtained before such an examination

3. Nor, apparently was there an inclusion in the record of the May 20, 1969 report of Dr. Messinger, on the basis of which, petitioner was returned to the court for sentencing. This report contained the same diagnosis as the July report.

4. Justice Sandifer, who denied petitioner's second *coram nobis* petition which raised the issue of competency at the time of the pleas, was likewise unaware of the Messinger reports.

Justice Gold, upon whose order Suggs was committed to Matteawan in November 1968, has testified by stipulation that he has no recollection of petitioner nor of any proceeding concerning petitioner.

could proceed. Nothing in the record indicates that this procedure was followed.

Mr. Tucker further testified that had he been aware of the fact that there had been such an examination, notwithstanding Dr. Messinger's determination, he would have asked for a further examination of petitioner, even if Justice Nunez had not done so. Mr. Tucker had no personal recollection of petitioner, but he testified before me that if he had interviewed a defendant and felt that he was "not in some way psychiatrically competent," he would put a notation in his file and request a psychiatric examination. The file is devoid of any such indication;[5] to the contrary, the file contained a statement signed by petitioner, written in Mr. Tucker's handwriting except for signature, admitting petitioner's guilt. Mr. Tucker testified that this was done because Suggs was "adamant about taking the plea, wanted to take the plea, demanded to take the plea," and Mr. Tucker wanted to protect himself.

Although neither Mr. Tucker, nor Mr. Collins, who, it must be noted, saw petitioner only on the occasion of the plea hearing, noted anything unusual about petitioner's behavior, the contrary was true of Justice Nunez. Justice Nunez testified by stipulation that had he been aware of the Messinger report of July 23, 1968, he still might have ordered the Bellevue examination since "[t]he defendant's answers were unusual. The Messinger report was only a preliminary report . . . [It] said that the defendant was without psychosis and did not speak to the issue of whether

5. Mr. Tucker was on the staff of Legal Aid which had fractional representation. He did not represent Suggs at any stage other than at the pleas.

he was competent to be tried." Indeed, Justice Nunez ordered the Bellevue examination not just in aid of sentencing but "for all purposes, including a determination of whether defendant was competent to be tried." Justice Nunez was the only witness who had an independent recollection of Suggs. He recalled the plea "because of the unexpected answer the defendant gave to his question following the plea."

An examination of the plea minutes reveals that Suggs' responses to post-plea questions posed by Justice Nunez were indeed unusual. Justice Nunez previously had asked Suggs if he was sorry for his acts, and Suggs replied that he was not. After the pleas were taken, Justice Nunez again referred to Suggs' lack of remorse, to which Suggs gave the most unusual reply that he had tried being sorry once and had lost a finger as a result.

The Court: You are not sorry at all that you did any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.

The Court: No matter what you do?

The Defendant: No matter what I do.

* * *

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.

* * *

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be—whom are you mad at?

The Defendant: No one. (plea minutes pp. 17-21).

Petitioner is, indeed, missing the top portion of his left pinky finger. Dr. Augustus Kinzel, a psychiatrist of impressive qualification, who examined petitioner in connection with this hearing and who, based on prior psychiatric reports and the record of prior proceedings concerning petitioner, offered expert testimony on petitioner's behalf, testified that in his opinion, Suggs' reference to his mother cutting off his finger was a "confabulation" or "loose association" indicative of psychosis, and the story had no basis in fact. According to Dr. Kinzel, based on

his interview with petitioner, the accurate version was that petitioner as a child had caught his finger in the chains of a swing; the chains pinched the finger which had to be amputated as a result. This version of those events is supported by statements contained in a clinical summary of petitioner's stay at Rockland State Hospital from August 1963 to January 1965. In the discussion of petitioner's personal history, the supervising psychiatrist stated: "At the age of 4 the first joint of [petitioner'] little finger was crushed and had to be amputated," and it is noted further:

> "*Trumatic Factors*: At the age of four the patient had an amputation of the first joint of his little finger because of a crushing injury . . . ."

Petitioner's stay at Rockland State Hospital was but one period in a life lived basically in reformatory-type and other institutions since aproximately 1961. The psychiatric reports in evidence demonstrate a history of maladjustment and instability, characterized by one suicide attempt while at the Wiltwyck School for Boys sometime after the death of Suggs' mother in the early 1960's, and another while Suggs was incarcerated in the Brooklyn House of Detention in August, 1968. It is of note that Dr. Messinger's first report was prepared prior to this August 1968 incident. Also of note are the records of a prior stay at Bellevue Psychiatric Hospital from July 28, 1965 to August 18, 1965, when petitioner was 14 years old. He was there diagnosed as having a "character disorder [with] paranoid and borderline features," and was referred to as a "passive aggressive type" with a "potential for schizophrenia." Another report of August 14, 1965 indicates that although the interviewer did not consider Suggs a psychotic youngster as yet, "there is a strong possibility . . . that he may develop into a paranoid schizo[phrenic] in the future."

Before proceeding with the psychiatric testimony offered by Drs. Lubin, Kadar and Messinger before Justice Melia, as well as that of Dr. Kinzel, a crucial report must be detailed. In connection with the preparation of the Lubin-Kadar report of October 21, 1968, several drafts were prepared. The first of these was dictated on September 19, 1968, only six days after the pleas. This draft states that petitioner was able to describe the details of the crimes charged in "an adequate manner," and that he "could be competent with the help of vigorous defense counsel." Dr. Lubin's impression at that time was that Suggs was "Schizoid with Paranoid Features."

Dr. Lubin testified that his conclusion at that time was that petitioner was incompetent, notwithstanding the possibility that if Suggs were a borderline case he might have been aided to a state of cooperation where he then might be considered competent. This tentative conclusion of incompetency was confirmed by the impression contained in Dr. Lubin's later notes of September 2, 1965 indicating that petitioner suffered from "Schizophrenia, Paranoid Type."

Dr. Lubin, after demonstrating his total familiarity with the standards for determining competence, testified that at no time during his interviews with petitioner was petitioner able to meet the criteria for competency; that petitioner could not fully appreciate the consequences of his position nor cooperate in his defense. He did indicate

that competency is a relative manner, and petitioner may have been more or less competent on particular occasions. Dr. Lubin additionally considered the possibility that petitioner may have wanted to promote the appearance of incompetency in order to escape responsibility, but he concluded that, despite any desire on petitioner's part to feign such a state, petitioner was predisposed to a mental disorder which, under the pressures of the circumstances, caused him to have a "reactive psychosis," i.e., to operate at a psychotic level of judgment. This particular testimony is supported by a clinical summary prepared on December 18, 1968, at Matteawan, which indicates that petitioner stated, among other things, that he "put on an act while at Bellevue in order to be sent to a hospital" in contradiction to a later statement that his lawyer "sent him to a hospital to get rid of him." Despite this initial "admission" of prevarication, petitioner was diagnosed at Matteawan as suffering from a "psychosis with antisocial personality, paranoid and reactive features."

Dr. Kadar testified that it was his opinion that petitioner was incompetent on October 21, 1968, the date that he and Dr. Lubin jointly interviewed Suggs, but that Suggs could have been experiencing a psychotic episode of unknown duration. If so, petitioner could have been competent at the time of Dr. Messinger's July report. Indeed, Dr. Kadar further testified that petitioner's unstable, depressive and paranoid condition diagnosed by Dr. Messinger in July 1968, could have deteriorated into the psychotic condition reflected in the October 1968 report. Dr. Lubin's testimony comports with this possibility of petitioner's being competent in July.

Dr. Messinger likewise conceded the possibility of Suggs' experiencing psychotic episodes. Although, as Justice Nunez pointed out, the Messinger report did not, on its face, speak to the issue of competence, Dr. Messinger testified that based on his examination, Suggs was competent on July 23, 1968. However, he further testified that "people who are found competent on one day can become psychotic or incompetent at another time at a later date and they can recover," and that his report was not inconsistent with the Lubin-Kadar report of October 21, 1968 finding Suggs incompetent. Indeed, Dr. Messinger's second report of May 20, 1969 indicates that, subsequent to his first report, petitioner "had a disturbed episode sufficient to have him committed to Matteawan where he remained some five and a half months . . . ."

Moreover, the possibility that Suggs could have been experiencing psychotic episodes even during the period in July 1968 that he was undergoing examination at the Supreme Court Psychiatric Clinic was conceded by Dr. Messinger. Since the psychiatric clinic operated on an outpatient basis, unlike Bellevue which provided continuous observation, Dr. Messinger testified that Suggs could have been (*sic*) short psychotic episodes and "it is not likely that I would know about it" if not manifested in aggressive or other behavior particularly noticeable to the prison authorities.

Dr. Kinzel testified that based on the record, his interview with petitioner, and his expertise, that it was his opinion that petitioner was, in fact, a paranoid schizophrenic and incompetent on September 13, 1968, the day

of the pleas. This testimony constitutes the only psychiatric opinion focused directly on the day in question. Dr. Kinzel, like Drs. Messinger, Lubin and Kadar, opined that petitioner had experienced a psychotic episode which he emerged from at Matteawan. It was Dr. Kinzel's impression, however, that the signs interpreted by Dr. Messinger as exhibiting a personality disorder could actually have described a psychosis. This testimony is not inconsistent with Dr. Kadar's view that petitioner's condition as reported by Dr. Messinger deteriorated into a psychotic state.

Dr. Kinzel additionally addressed the substance of the plea minutes which evidenced that petitioner, in response to extensive questioning by the court, described in some detail the circumstances of two of the crimes charged, and, when asked the reason for his acts, petitioner replied as follows:

> The Court: This lady that you raped on May 24th didn't have anything to do with the rape of your sister, did she?
> The Defendant: No, sir.
> The Court: Why did you attack her?
> The Defendant: I just had it in mind.
> The Court: You just had it in mind?
> The Defendant: Yes, sir.
> The Court: About how old a person was this lady?
> The Defendant: About thirty-six.
>
> * * *
>
> The Court: How old a lady was she, about?
> The Defendant: About thirty-nine, forty.
> The Court: About thirty-nine or forty. Why did you steal the money from her?

> The Defendant: I just wanted to steal it.
> The Court: What?
> The Defendant: I just wanted to steal it. (plea minutes, pp. 12-14)

It was Dr. Kinzel's view that petitioner's responses demonstrated a "psychotic lack of judgment;" that is, no serious awareness of the import of the colloquy and necessity for offering a defense. Dr. Kinzel testified that in petitioner's non-psychotic state, he has "relevant normal consciousness;" when psychotic "he does just what thought comes into his head." This observation is obviously reflected in the plea minutes. Additionally, Dr. Kinzel stated that since persons in psychotic states often can recount their acts quite literally and factually while lacking an understanding of the same, petitioner's detailed report of the crimes was entirely consistent with a psychotic state.

It was petitioner's ability to relate the facts, as well as his adamant desire to plead, that led Mr. Tucker, petitioner's counsel, to believe that petitioner understood the proceedings and could adequately assist in his defense. However, as Dr. Kinzel pointed out, it is not uncommon for a non-psychiatrist, even an experienced defense lawyer, to overlook incompetency, particularly when manifested by what appears to be a capacity to discuss the crimes. Nor, in Dr. Kinzel's view, was petitioner's obstinate resolve to plead inconsistent with a psychosis.

While Mr. Tucker may not have found petitioner's responses indicating a total lack of concern and Suggs' obscure and sudden reference to his losing a finger as a child as a result of his mother's act unusual, it was apparently

a strange enough response for Justice Nunez to recall the incident, as well as petitioner himself, some eight years after the pleas, and to cause Justice Nunez to send petitioner at the time to Bellevue to be examined "for all purposes," even though the court was advised by Suggs at the plea hearing that an examination had already been conducted "right downstairs."

Weighing all the evidence, the conclusion is inescapable that petitioner was incompetent on September 13, 1968. Although Dr. Messenger indicated that petitioner was competent on July 23, 1968, that report was prepared some seven weeks before the pleas were entered, and as reflected in the May 20, 1969 report, Dr. Messinger acknowledged petitioner's psychotic condition which prompted the Matteawan commitment. He also conceded the possibility that petitioner may have been experiencing a psychotic episode even at the time the July examination was being conducted. The only other indicia of competence is Mr. Tucker's testimony and, although an attorney's opinion as to his client's ability to understand the nature of the proceedings and to cooperate in his defense is significant, *United States ex rel Roth* v. *Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972), it is by no means controlling, especially in light of Justice Nunez's observation and reaction with which, based on my reading of the plea minutes, I agree. Dr. Kinzel's testimony relating to the account of petitioner's loss of a portion of his finger, and the indications that the finger was crushed and then amputated, rather than chopped off by Suggs' mother, as recalled by petitioner, bolsters my conclusion in this regard.

Furthermore, the above, coupled with the fact that petitioner was found to be incompetent by Dr. Lubin only six days after the plea, which conclusion was confirmed and corroborated by Dr. Kadar some four weeks later, and that on the basis of the Lubin-Kadar report, without objection by the respondent, petitioner was committed to Matteawan, substantially negates any other conclusion but that petitioner was indeed incompetent at the time of the pleas.

Since the pleas, taken when Suggs was incompetent must be regarded as null and void, *McCarthy* v. *United States*, 394 U.S. 459 (1969); *Pate* v. *Robinson*, 383 U.S. 375 (1966), petitioner's guilty pleas are vacated and the writ of habeas corpus shall issue sixty days from the date of the filing of this opinion, unless within that time petitioner is allowed to replead to the indictment in state court.

It appears, however, that on the basis of communications I received from petitioner following the hearing, that petitioner may be exhibiting the same symptoms which gave rise to his original commitment to Matteawan; i.e., a belief of persecution by the prison authorities and fear for his life, and periods of blackouts. It thus may be appropriate that the state court consider causing petitioner to be examined once again as to his mental competency at this time.

I again wish to express the Court's appreciation to Judson A. Parsons, Jr., Esq. and Christopher Kende, Esq. for their assistance in this case.

So Ordered.

/s/ Kevin Thomas Duffy

U. S. D. J.

Dated: New York, New York
April 5, 1977.

Appendix J

Opinion of the New York State Supreme Court December 6, 1973

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 30

Indictment Nos. 3063/68, 3063A/68, 2251/68

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN SUGGS,

Defendant.

JAWN A. SANDIFER, J.:

This defendant was indicted on May 29, 1968, for the crime of assault in the second degree and on July 30, 1968 on each of two separate indictments for the crimes of rape in the first degree on three (3) counts, sodomy in the first degree on three (3) counts, robbery in the first and third degrees on each of two (2) counts, and other includible crimes. On September 13, 1968, he pleaded guilty to one count of the crime of robbery in the first degree and one count of rape in the first degree in satisfaction of all three (3) indictments and was sentenced on June 6, 1969, to two indeterminate periods of imprisonment for a maximum term of fifteen (15) years and a minimum term of five (5) years on each of these counts to be served concurrently.

This disposition was affirmed by the Appellate Division on October 13, 1970. He is presently incarcerated in the Auburn Correctional Facility. He now moves to vacate this judgment of June 6, 1969, on the grounds that the judgment was obtained in violation of his rights under the Federal Constitution citing People v Codarre, 10 NY 2d 301, 223 N.Y.S. 2d 457, 179 N.E. 2d 474 (1961).

To put this application in perspective, a brief review of the pertinent fact situation is in order. At the time of the acceptance of the pleas of guilty on September 13, 1968, indicated above, the judge committed the defendant to Bellevue Hospital for observation, examination and report as to his mental condition and the endorsement on what is commonly referred to as the "Work Sheet" indicates that this procedure was to be "in aid of sentence", (see S.M. of plea at page 20) that is to say, that while Judge Nunez apparently felt that the defendant needed help (S.M. of plea at page 21), he apparently did not question the defendant's sanity at that time nor does the record disclose that his attorney raised this issue, nor is it asserted that, assuming the sanity of the defendant, the colloquy did not comply with the requirements of Boykin v Alabama, 395 U.S. 238. However, on November 6, 1968, pursuant to an order of Mr. Justice Gold, based on a report from Bellevue Hospital finding the defendant to be "schizophrenic, paranoid type", the defendant was committed to Matteawan State Hospital where he remained until April 14, 1969, when he was certified as being "no longer . . . incapable of understanding the charge against him." and returned to court for sentencing.

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A fair reading of the sentencing minutes of June 6, 1969 makes "crystal clear" that the court had afforded defendant's counsel an opportunity to familiarize himself with his client's desire to withdraw his previously entered guilty pleas, and that the defendant at a time when his competency has been attested to by qualified psychiatrists (see letters dated April 4, 1969 from Matteawan State Hospital, Defendant's Exhibits F and G), categorically indicated that he "wanted to accept the sentence in this case" (S.M. of sentence at pages 3 and 4); and, in addition, a fair reading of these minutes would certainly indicate that the defendant was afforded the opportunity to *withdraw* his previously entered pleas and not merely "to move to set (them) aside" as implied in paragraph 14 of the defendant's affidavit (sworn to September 25, 1973, at page 9).

The thrust of defendant's argument is that at this point in the face of the defendant's categorical refusal to withdraw his plea in open court in the presence of counsel, that the court, sua sponte, should have set his plea aside for the sole purpose of inquiring of him whether his pleas were "intelligent and voluntary" (Boykin v Alabama, *supra*) despite the fact that at the time his original pleas were taken (September 13, 1968), it is far from clear that the defendant was incompetent.

It will suffice to say that we do not read Boykin so as to require this procedure in this case. In Boykin v Alabama, *supra,* an indigent defendant pleaded guilty to each of five (5) indictments three days after his arraignment with no questions being asked concerning this plea by the

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court and found himself facing execution. After finding that "it was an error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary," the court went on to quote Carnley v Cochran, 369 U.S. 506, 516, wherein it had dealt with the problem of waiver of the right to counsel, a Sixth Amendment right:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be some allegation on evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." (U.S. v Boykin, *supra,* p. 242).

Applying that standard to this case we find that the evidence is overwhelming that the defendant by his guilty pleas knowingly, intelligently and voluntarily waived his constitutional right against self-incrimination under the Fifth Amendment, his right to trial by jury (Duncan v Louisiana, 391 U.S. 145), and his right to confront his accusers (Pointer v Texas, 380 U.S. 400), and that this motion is in all respects denied.

This decision shall constitute the decision and order in this case and a copy thereof shall be served on the defendant where he is incarcerated as well as on Judson A. Parsons, Jr., 140 Broadway, New York, New York, 10005, and the Assistant District Attorney in this case, Richard Printz, Esq.

Dated: December 6th, 1973

J.S.C.

Appendix K

Opinion of the New York State Supreme Court December 3, 1975

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM : PART 38

Indictment Nos. 3063/68, 3063A/68, 2251/68

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN SUGGS,

Defendant.

MELIA, J.:

This defendant was indicted in May and July of 1968 on three indictments charging multiple unrelated crimes of rape, sodomy, robbery, assault and larceny.

On September 13, 1968 he pleaded guilty to rape in the first degree and robbery in the first degree in satisfaction of all charges. On June 6, 1969 he was sentenced thereon to two indeterminate terms of imprisonment of from five to fifteen years to run concurrently.

He appealed to the Appellate Division, First Department, on the limited issue of his right to a competency

hearing *at the time of sentence*. This appeal was denied (People v. Suggs, 35 A D 2d 781 [1970]). Leave to appeal to the New York Court of Appeals was denied on November 6, 1970.

The defendant then filed a writ of error coram nobis in this court, alleging the same ground. This petition was denied.

He then sought a writ of habeas corpus in the United States District Court for the Southern District of New York. Proceedings therein were suspended pending a return to this court for a determination "of *the issue of the sentencing court's failure to afford the colloquy on voluntariness mandated by Boykin* v. *Alabama, 395 U.S. 89.*"

Such a petition was brought in this court and denied on December 6, 1973, by Sandifer, J. Leave to appeal was denied on March 5, 1974. The habeas corpus petition then proceeded in the federal court.

The United States District Court then vacated the guilty pleas, and as a consequence thereof the sentences imposed, and granted the writ of habeas corpus unless within sixty days the petitioner was permitted to replead to the indictments in this court.

The District Court based its decision on the ground that the pleas of guilty were null because of incompetency and the attempt at ratification of the prior pleas at the time of sentence did not meet the Boykin standard (United States ex rel. Suggs v. La Vallie (*sic*), 390 F. Supp. 383 [1975]).

The People appealed this decision to the United States Court of Appeals for the Second Circuit. The United States Court of Appeals vacated the order of the District

Court and remanded "the case for an evidentiary hearing . . . on the prisoner's competence at the time of his guilty pleas were entered, in the light of two psychiatric reports which were not before the district court at the time the order now before us was entered."

Consequently this case is now here in remand from an order of the United States District Court for the Southern District of New York for a hearing, pursuant to the order and opinion of the United States Court of Appeals for the Second Circuit.

The issue to be determined herein at a hearing is that of the defendant's competency at the time he entered pleas of guilty to rape in the first degree and robbery in the first degree on September 13, 1968.

Further, if the defendant was incompetent at the time of plea, the question then presents itself as to whether the defendant satisfactorily ratified his pleas of guilty when he appeared for sentence on June 6, 1969.

The order of remand requests an explanation of the circumstances surrounding the finding in 1975 of two psychiatric reports of Dr. Emanuel Messinger of July 23, 1968 and May 20, 1969. These reports are of great importance in the resolution of the issues. As the United States Court of Appeals said: "we believe that the report dated July 23, 1968 may well be of critical importance to the determination of Suggs competence at the time of his pleas."

For a proper understanding of the facts and issues as to the reports the chronology of events is important.

The defendant was arrested on May 6, 1968, in connection with an incident at City College during the course of which a police officer was allegedly injured. The defend-

and was held for the action of the grand jury on May 13, 1968. Indictment #2251/68 was returned thereon on May 29, 1968.

Subsequently, the defendant was arrested and indicted on a multiplicity of unrelated charges of rape, sodomy, robbery and larceny contained in indictments #3063 and #3063A of 1968.

The defendant was then of an age which made him eligible for possible youthful offender treatment. The practice of the court, of which I take judicial notice, was to conduct a pre-pleading investigation by the probation department in the Youthful Offender Part in order to enable the judge to determine whether he would approve a youth for youthful offender treatment. As part of that process a *preliminary* psychiatric evaluation was routinely done. (If any matter is disclosed therein requiring further evaluation a CPL §730 examination is ordered.)

The court papers herein disclose that on July 15, 1968, Elmer W. Reeves, the Chief Probation Officer, sent such a request to the Supreme Court Psychiatric Clinic.

Parenthetically I should note that this request had to do with the factual situation referred to in indictment #2251/68, the first in sequence.

Pursuant to this request Dr. Emanuel Messinger, the psychiatrist in charge, made such an examination. He reported in writing to the *"Presiding Justice of Youth Part Supreme Court"* on July 23, 1968.

Thereafter Judge Tierney disapproved the defendant for youthful offender treatment.

That there was such an examination there can be no doubt. That was the routine practice of the court in such

cases; Mr. Reeves dated request therefor is extant; Dr. Messinger's report is genuine and he so testified. Furthermore in the minutes of plea Judge Nunez inquired if there had been such an examination. It was the defendant himself who volunteered an affirmative reply that he had been examined "downstairs." When Judge Nunez inquired of the clerk of the court about a report, the clerk advised that he found no such record in the file. It should be noted, however, that the examination was specifically held in connection with indictment #2251 while the judge and clerk were obviously talking about the cases in which pleas had just been taken, #3063 and #3063A. These pleas, however, also covered #2251. Judge Nunez then saw fit to have the defendant examined at Bellevue.

Lest too much emphasis be placed on the fact of the examination of Dr. Messinger and the possible reasons therefor, it is important to stress the practice of the court.

Because the facilities at Bellevue Hospital are heavily over burdened, a screening procedure was initiated in this court to have the court psychiatrist preliminarily determine if, in his opinion, a more extensive examination is required. In addition, in other cases, particularly where a youth is involved in a serious crime, such as here, such evaluations are routinely made. And it was done in this case. That report did not indicate that the defendant was incompetent.

I should also note that psychiatric examinations are often made after a guilty plea and prior to sentence as an aid and guide to the court in the imposition of sentence.

In this connection the Justices of the Appellate Division, First Department, have recently called to the attention of all trial judges the desirability of continuing the practice of having such examinations prior to sentence in certain cases. So it was no novelty that Judge Nunez ordered an examination of this defendant after his guilty pleas.

Was the defendant competent at the time of plea?

Clearly the conviction of a defendant while incompetent violates due process.

He was arrested on May 6, 1968, and arraigned in the Criminal Court. In due course he was held for the action of the grand jury. Indulging in the presumption of regularity, it is safe to assume that no judge of the Criminal Court observed any conduct on the part of the defendant that required any sua sponte action on his part. Nor is there any evidence that counsel for the defendant, his family, or anyone else brought anything to the court's attention bearing on the defendant's mental competency.

After indictment the defendant was arraigned in the Youth Part of the Supreme Court. As heretofore noted, in keeping with the custom of that court, the defendant was preliminarily examined by Dr. Messinger and report made on July 23, 1968

[It has been conceded that that report was never known to Judge Nunez, who took the plea, nor to Judge Sandifer, who later heard one of the defendant's post-conviction motions. However, as the United States Court of Appeals noted, it is still relevant and probative on the issue of the defendant's competency at the time of plea.]

Dr. Messinger testified here that he then found the defendant to be competent and his report of July 23, 1968, so indicates.

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Thereafter the defendant was disapproved for youthful offender treatment by Judge Tierney, and in due course appeared before Judge Nunez. On September 13, 1968, while represented by counsel, the defendant entered the pleas of guilty here in question.

Relevant excerpts from the extensive plea minutes follow.

The Court: Excuse me.

Mr. Suggs, I want you to listen carefully to what the district attorney is saying now, please. Can you hear him all right?

The Defendant: Yes, sir.

The Court: All right, go ahead. (S.M. p. 3)

• • •

The Court: All right, that motion is granted. Indictment Number 3523 of 1968 is dismissed on motion of the district attorney.

Now, Mr. Suggs, you say you are seventeen?

The Defendant: Yes, sir.

The Court: When were you born?

The Defendant: June 27th, 1951.

The Court: And where were you born?

The Defendant: Harlem Hospital.

The Court: Here in New York?

The Defendant: Yes, Sir.

The Court: You went to school here?

The Defendant: Yes, sir.

The Court: How far did you go?

The Defendant: Eleventh grade.

The Court: What high school did you go to?

The Defendant: Charles Evans Hughes.

The Court: And where were you living when you were arrested?

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The Defendant: 519 West 143rd Street.

The Court: With whom?

The Defendant: My aunt.

The Court: Where is your father and mother? Where are they?

The Defendant: My mother is dead and I don't know where my father is.

The Court: Do you have any brothers or sisters?

The Defendant: I have one sister.

The Court: How old is she?

The Defendant: Twenty-two.

The Court: How long have you been in jail now?

The Defendant: Over three months.

The Court: Have members of your family been to see you?

The Defendant: No, sir.

The Court: This aunt of yours, was she your blood aunt or is it you just call her aunt?

The Defendant: I call her my aunt.

The Court: How long have you lived with—what is her name?

The Defendant: Geraldine Hall.

The Court: How long have you lived with her?

The Defendant: Since '65.

The Court: And your sister, where does she live?

The Defendant: She lives down South.

The Court: When did your mother die?

The Defendant: '62.

The Court: You don't know—when was the last time you saw your father?

The Defendant: When I was about ten or nine.

The Court: Now, is Mr. Tucker from the—one of the attorneys on the staff of the Legal Aid Society your attorney in this case?

The Defendant: Yes, sir.

The Court: Have you talked over these cases that are pending against you with Mr. Tucker?

The Defendant: Yes, sir.

The Court: Did you hear him tell me that you wish to plead guilty to two very serious crimes, one is rape in the first degree and the other one is robbery in the first degree? Did you hear Mr. Tucker tell me that?

The Defendant: Yes, sir.

The Court: Is that your wish?

The Defendant: Yes, sir.

The Court: Did you hear the district attorney tell me that with reference to the rape case it is the People's claim that on May 24, 1968, at about 8:35 p.m. you had sexual intercourse with a woman whose name was Doris A. Mohit and you had this relation with her against her will and by use of force? And he said that this is stated in—it is alleged to have taken place in a building on Hamilton Avenue and 139th Street on that day? Did you do that?

The Defendant: Yes, sir.

The Court: What did you do with this woman?

The Defendant: I took her up to the top floor.

The Court: Had you seen this woman before at all?

The Defendant: No, sir.

The Court: Where did you pick her up or where did you get a hold of her?

The Defendant: Coming off Amsterdam.

The Court: Coming off Amsterdam?

The Defendant: Yes.

The Court: Was it dark on this day?

The Defendant: Yes, sir.

The Court: Of course, you are not married to her?

The Defendant: No, sir.

The Court: You had never seen her before?

The Defendant: No, sir.

The Court: And what did you do? How did you get her to go up there?

The Defendant: Told her if she didn't go up there I would blow her head off.

The Court: Well, do you feel any remorse for having done this? Do you feel sorry you did something like that?

The Defendant: No, sir.

The Court: You don't feel sorry?

The Defendant: No, sir.

The Court: Well, you wouldn't like that to happen to your sister, would you?

The Defendant: It did.

The Court: What?

The Defendant: It did.

The Court: That happened to your sister?

The Defendant: Yes, sir.

The Court: You weren't happy about it, were you?

The Defendant: No, sir.

The Court: So you didn't like it?

The Defendant: No, I didn't.

The Court: You did not like it?

The Defendant: I did not like it.

The Court: This lady that you raped on May 24th didn't have anything to do with the rape on your sister, did she?

The Defendant: No, sir.

The Court: Why did you attack her?

The Defendant: I just had it in mind.

The Court: You just had it in your mind?

The Defendant: Yes, sir.

The Court: About how old a person was this lady?

The Defendant: About thirty-six.

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The Court: Did you hear the district attorney say that on April 30th, 1968, at about 7:40 p.m. on 136th Street between Amsterdam and Broadway, here in Manhattan, that you had a knife in your hand and that you stole a purse containing the sum of eight dollars from a lady whose name is Eleanor Evans? Did you hear him say that?

The Defendant: Yes, sir.

The Court: Did you threaten the lady with a knife if she didn't give you the money?

The Defendant: Yes, sir.

The Court: Had you ever seen this lady before in your life?

The Defendant: No, sir.

The Court: How old a lady was she, about?

The Defendant: About thirty-nine, forty.

The Court: About thirty-nine or forty. Why did you steal the money from her?

The Defendant: I just wanted to steal it.

The Court: What?

The Defendant: I just wanted to steal it.

The Court: Were you alone when you did these things?

The Defendant: Yes, sir.

The Court: Were you working or were you still going to school?

The Defendant: I wasn't going to school. I was working.

The Court: What kind of work were you doing?

The Defendant: Teach people self-defense.

The Court: You teach people. Do you do it at some school or just on your own?

The Defendant: My own school.

The Court: Your own school?

The Defendant: Yes, sir.

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The Court: What do you teach them? How do you teach them to defend themselves?

The Defendant: I teach them karate, gun foo.

The Court: What do all these things mean?

The Defendant: That's just self-defense.

The Court: That's karate?

The Defendant: That's karate.

The Court: Where did you learn it?

The Defendant: From my instructor.

The Court: When did you stop going to school?

The Defendant: Stopped going to school in '67.

The Court: And were you paid for teaching people self-defense?

The Defendant: Yes, sir.

The Court: But you had no regular job? You didn't work for anybody else?

The Defendant: No, sir.

The Court: Where did you teach these people?

The Defendant: City College in the gym every Friday, Saturday night.

The Court: Now, has anyone made any threats to you which have induced you to enter these pleas of guilty to these two crimes?

The Defendant: No, sir.

The Court: Has your lawyer or the district attorney or anyone else made any promise to you as to what the sentence of the court will be?

The Defendant: No, sir.

The Court: Are you entering these two pleas of guilt voluntarily?

The Defendant: Yes, sir.

The Court: And are you entering these pleas of guilt because you did rape this girl on May 24th, 1968, and because you did rob this lady of her pocketbook on April 30th, 1968? Is that why you are entering the pleas?

The Defendant: Yes, sir.

The Court: And for no other reason?

The Defendant: No other reason.

The Court: Have you been examined by doctors since you were arrested?

The Defendant: Yes, sir.

The Court: Where?

The Defendant: Right downstairs.

The Court: Right downstairs here?

The Defendant: Yes, sir.

The Court: Were you examined at Bellevue Hospital?

The Defendant: No, sir.

The Court: Do we have a psychiatric report on file, please, Mr. Yochelson?

The Clerk: No indication, no.

The Court: How did you happen to pick this girl, this lady, to rape her? How did you happen to pick her out?

The Defendant: I just seen her.

The Court: Well, you saw many other women, didn't you?

The Defendant: Yes, sir.

The Court: Why did you pick on her? Any particular reason?

The Defendant: No particular reason.

The Court: You are not sorry at all that you did any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.

The Court: No matter what you do?

The Defendant: No matter what I do.

The Court: Well, of course, you knew that you were doing something that was illegal, to say nothing of immoral? You knew that, did you not, when you were doing that?

The Defendant: Yes, sir, I knew that.

The Court: Arraign him on those two pleas. I will take the pleas.

The Clerk: John Suggs, you are advised that if you have been previously convicted of two or more felonies that fact may be established hereafter, and when you plead guilty under these indictments you may be sentenced as a persistent felony offender. Do you understand that?

The Defendant: Yes, sir.

The Clerk: Do you now withdraw your plea of not guilty heretofore interposed by you and do you now plead guilty to the crime of rape in the first degree under Indictment 3063 of 1968, and do you further plead guilty to the crime of robbery in the first degree under Indictment 3063A of 1968, those pleas to cover also indictment 2251 of 1968? Are those your pleas?

The Defendant: Yes, sir.

[whereupon, the defendant was duly sworn and his pedigree was taken.]

The Court: Well, now, Mr. Suggs, you know that you are going to be punished for these crimes, do you not?

The Defendant: Yes, sir.

The Court: Well, don't you think it might help you if you show that you are sorry, you show some compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger, you say?

The Defendant: Part of it.

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.

The Court: Did you get in difficulties in school or no?

The Defendant: I didn't get in no difficulties in school.

The Court: You didn't have fights with other children or things like that?

The Defendant: No.

The Court: Set it down for investigation and sentence October 31st. I want a complete psychiatric examination and report on this boy. And for that purpose I wish to commit him on my motion to Bellevue Hospital for examination and report.

Mr. Tucker, do you feel that in view of what this boy has stated here today that an examination is in order?

Mr. Tucker: I think it would be in order, Your Honor, to help Your Honor and the court determine the sentence of this defendant. I would recommend that, Judge.

The Court: All right, committed to Bellevue Hospital for examination and report, psychiatric examination and investigation, and sentence 10-31, October 31, 1968.

We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be—whom are you mad at?

The Defendant: No one.

The Court: All right, see you on the 31st. Try to cooperate with the doctors. See if they can help you. (S.M. p. 7 thru 21)

After plea on September 13, 1968, Judge Nunez ordered a psychiatric examination and adjourned sentence. The psychiatric report of Drs. Kadar and Lubin of October 21, 1968 found the defendant to be *then* incompetent.

Whether or not the defendant was incompetent on October 21, the question here is, was he incompetent on September 13.

The District Court, in its opinion herein in 390 F. Supp. 383 at p. 389, said, "It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to stand trial, such a plea *must* be considered null and void * * *."

I respectfully submit that that is neither true as a matter of fact nor law. Indeed the psychiatrists, Drs. Kadar and Lubin, called by the defense here, concede that the defendant could very well have been competent on September 13 when he entered his plea. And Dr. Messinger who found him to be competent on July 23, 1968 conceded that the defendant could have been incompetent on 9/13/68.

I certainly agree that proof of incompetency shortly after the entry of a plea is both relevant and highly impor-

tant evidence on the issue of competency at the time of plea. *But it is not determinative.* No more so than the Messinger testimony of competency before plea.

The relevant evidence on the issue of the defendant's competency at the time of plea consists of the testimony and reports of Drs. Messinger, Kadar and Lubin, the minutes of plea and the testimony of those who saw and or talked to him at that time.

Turning to the minutes of plea—it seems abundantly clear that the defendant knew where he was and what he was doing. His answers were clear, relevant and responsive. The minutes of plea cover twenty-one pages. The defendant verbalized more than his counsel or the district attorney. He was represented by an extremely able and experienced attorney. His memory was intact. He admitted consultation with counsel. The facts of each of the two cases to which *he* pleaded guilty were explained to him twice—once by the assistant district attorney and once by the court. He admitted his guilt as to each and further explained additional aspects to the court. He even prognosticated the age of a female victim as "about thirty-six," and the other as "about thirty-nine, forty."

He was asked if any promises were made to him and if his plea was voluntary. He said no promises were made and the plea was voluntary and that he was pleading guilty only because he in fact was guilty.

The United States Court of Appeals found that "Justice Nunez conducted an extensive voir dire examination of Suggs * * *. Suggs' responses indicated that he understood the charges, that there was a factual basis for his

pleas and that he was pleading voluntarily. He admitted all of the alleged facts and even volunteered information."

Why would a defendant, represented by an able and experienced lawyer, enter a plea of guilty to two class B felonies, each carrying a possible sentence of up to twenty-five years? Was it due to the mental incompetence of the defendant and/or the legal incompetence of counsel, or was it due to an abundance of prudence on their part?

The defendant faced multiple count indictments embracing many unrelated crimes of rape, sodomy, robbery, weapons, assault etc. Would not competent judgment dictate the acceptance of the best offer in order to avoid convictions on multiple counts with the added impact of the court having heard live testimony of victims?

In this connection is is also interesting to note that through years of litigation the defendant never raised the issue of his competency *at the time of plea,* until he brought this writ in the federal court.

Did Judge Nunez order a psychiatric examination after the plea but prior to sentence because he believed the defendant then to be incompetent?

As previously indicated this was and is a regular practice of the court. It frequently is an aid in sentence and particularly so when the defendant is a youth, as was this defendant.

Dr. Lubin, called by the defense, testified in part as follows:

> Q. Did you feel that the defendant, the patient, understood the nature of the legal process? A. Yes.
>
> Q. Do you feel that he was able to recognize the consequences or possible consequences that could flow

from the legal process to him? A. I think that he could in a limited sense. I think that he really wasn't fully appreciative of the dangers that might be involved in his adamant stance on one position or another, like his innocence, for example.

In other words, I don't think he fully appreciated it, no. I think he could have known what it means to go to a jail or to a hospital, he had been in both places, but I don't think he appreciated it too well at that time.

The Court: I don't quite follow what you mean by that doctor. You mean he didn't appreciate that it might be to his advantage to plead guilty rather than stand trial?

The Witness: Yes, I don't think his judgment was good.

The Court: When you say "judgment," you are talking about the exercise of prudence, right?

The Witness: Well, just in terms of what's good for a person at a particular time.

Like, in other words, some people have better judgments than other people, but some one individual may have better judgment at one time than another time.

I think at this particular point in time his judgment was not as good as it could potentially be, perhaps as good as it is today or perhaps as it was in September of 1968, early September 1968 or August 1968, or some such thing.

The Court: But are you talking about judgment in terms of the exercise of prudence and wisdom or something else?

The Witness: Well, Judge, I would say being prudent, wisdom, yes, that would satisfy me, yes.

The Court: Don't you find it a common phenomena from your experience at Bellevue that—and life

generally that frequently a defendant will go to trial, stand trial, when it's against his own best interest to do so?

The Witness: Yes.

The Court: And not be suffering from any mental deficiency?

The Witness: Yes. Mental disease.

The Court: Mental disease.

The Witness: Yes, it's true that they use bad judgment. It happens a lot.

By Mr. Seewald:

Q. Was it—did you find that the defendant was able when he did not deny the commission of these crimes—well, first, was he able to describe what it was that he was charged with at any point? A. He was able to describe it, but reluctantly, and then decided to deny. It depends on who he spoke to when, but it was our impression that he knew that he was being tried for rape or robbery or both.

He was maybe electing not to remember that he had done anything, but I believe that he generally held that he knew what the crime that he was being tried was all about.

Q. Would you agree that it's human nature often to deny certain unpleasant facts to various people when confronted with those allegations? A. Very common.

Q. And is it also human nature sometimes to just try to blot it out of your mind? A. Yes, very common.

* * *

Q. If the defendant truly was not purposely withholding the information, you know, in a devious plan to improve his position, how far back—if you can say—how far back could his incompetency go?

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Could it be almost any period of time, either negligible or long? A. Depending upon the kind of symptoms and signs we see of disorder in thinking it could be one hour, one day, a week. It could be six months.

Q. And do you have any indication based on signs that you, you know, your recollection has been refreshed about? A. Yes, I would say the particular signs that he showed and symptoms that we had.

If I can quote from my report:

> "There were not specific paranoid delusions elicited although he is quite guarded and suspicious." and so on.

He didn't have a full-blown psychosis. We could have assumed that it might have been a shorter period rather than a longer period that he had the symptoms that he had in order for us to think of him as incompetent.

So it might have been that he was competent at a very brief period before the time that we saw him.

> The Court: That specifically raises the question as to his competency when he entered the plea of guilty on September 13, 1968.
>
> The Witness: Yes.
>
> The Court: What would your answer be as to that?
>
> The Witness: I don't know.
>
> The Court: You don't know?
>
> The Witness: I can only say that he might well have been competent in September.

* * *

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By Mr. Seewald:

Q. Now I call to your attention the statement that in your report, and I quote, "He claims having seen many different Legal Aid attorneys but states that his most recent attorney told him his best chance to minimize his sentence was to admit guilt to which he acquiesced."

How does that square with the analysis that we have just put forward? A. You are talking about the man when he was considered competent, the man at trial, prior to trial considering a plea? It squares. There is no problem there.

He was evidently able to come to a conclusion at that particular point, and I think he was in a plea situation with Judge Nunez before he was transferred to the prison ward.

There was no problem. He was cooperating with his attorney.

Dr. Messinger, called by the People, testified in part as follows:

> Q. Doctor, at the conclusion of all of the tests and examinations, did you reach a conclusion as to the competence of the defendant John Suggs? A. Yes.
>
> Q. And what was that conclusion? A. My conclusion was that he was competent to stand trial and cooperate with counsel and that he had sufficient understanding to participate in his defense.
>
> Q. Did he understand what proceedings were being brought against him in court? A. In my opinion, he did.
>
> Q. Did he recognize and understand the possible consequences of the courtroom proceedings? A. In my opinion, he did.

Q. Was he able at that time to assist his defense attorney, whoever that might be, in the defense of his case? A. In my opinion he was able to.

Q. Were you able to communicate with the defendant? A. I was able to communicate with him.

Q. Now, doctor, given the fact that, I believe you know, that he was found to have been not competent, I believe, October 21st, 1968. Given that fact, does that necessarily mean that he must have been incompetent on September 13th, 1968? A. By no means.

The Court: I didn't hear that.

The Witness: By no means.

By Mr. Seewald:

Q. Could you explain that? A. Well, people who are found competent on one day can become psychotic or incompetent at another time at a later date and they can recover.

* * *

Q. Now when you examined the defendant again on May 20th of 1969, referring to your report, did you find any significant change in the defendant or to the contrary? A. No, I did not find any significant change.

Q. What was his—his diagnosis at that time? Was it—well, you have in your report— A. Yes, I kept the same diagnosis.

Q. You indicate in the report of May 20th that among other things that the defendant is cool and calculating in his mode of responding? A. Yes.

Q. Did you find that to be the case in the prior observation as well or not? A. I believe I did.

Q. And did that indicate anything particular to you, doctor? A. It indicated to me that he knew what he was doing. He was aware of what he was doing, and

he was trying to find what he thought was the best way to get out of his unpleasant situation.

* * *

Q. —incidentally, on the other question tied in with the fact that this defendant subsequent to your first examination had pleaded guilty, does the fact that he denied—given the fact that he denied having any remorse for his alleged crimes, does that have any bearing now on the issue of competency? A. I don't think so.

Q. Why is that? A. Because I feel in order for a person to have remorse they have to have feelings of guilt and social responsibility which our diagnosis of that type of behavior disorder would say he is not likely to have.

The Court: Before I lose this, doctor, so then going back to the question I asked earlier, so the fact that Mr. Suggs was examined by you, are you saying was not as a result of any conduct or manifestation of incompetency that he exhibited—

The Witness: No.

The Court: —either in the courtroom or to counsel, or to the correction authorities that you are aware of—

The Witness: Yes.

The Court: —but rather to the routine practice of accepting defendants in the youth part?

The Witness: Yes.

On the issue of competency at the time of plea, the defense rests heavily on the testimony of the psychiatrists, Drs. Kadar and Lubin.

Dr. Messinger had examined the defendant in July 1968 and found him "without psychosis and of average intelli-

gence." The plea was entered on September 13, 1968. Dr. Lubin examined the defendant on September 25, 1968, and Dr. Kadar conducted an examination on October 21, 1968. By a report dated October 21, 1968, Drs. Kadar and Lubin found the defendant to be incompetent.

At no time, from the date of arrest in May 1968 through the plea of guilty on September 13, 1968, did the defendant by word or act raise any question of competency. Counsel presented no such issue.

Dr. Messinger, a man of long experience with highly impressive credentials, gave cogent and compelling testimony as to the defendant's competency in July 1968. His testimony seemed, at least to this court, to be highly credible and reliable. The testimony of Drs. Kadar and Lubin was not as impressive.

In any event, all three psychiatrists agree that whether the defendant was incompetent or competent in October 1968, he could very well have been competent on September 13, 1968.

It should be noted, too, that, on the defendant's appeal from his conviction, he did not raise the issue of his competency at time of plea but rather that the *sentencing judge* should have ordered a competency hearing sua sponte. And this despite the fact that the defendant had just been returned from Mattewan State Hospital as competent and another preliminary examination by Dr. Messinger had confirmed this finding.

Bizarre behavior at time of plea is referred to by the District Court. This apparently relates to the defend-

ant's assertion, in response to a question by Judge Nunez, that he was not sorry for what he had done.

Far from being bizarre, it is no novelty in this court for a defendant to deny remorse or to manifest complete indifference for a criminal act.

Additionally, the minutes of plea reflect no impairment of memory. He answered questions covering many aspects of his life from birth to date of arrest and even recalled Dr. Messinger's examination some six weeks prior to plea. He recalled the crimes to which he pleaded and volunteered information in connection therewith. He demonstrated a capacity to exercise judgment. He was able to assess the ages of two of his victims. His answers were responsive, relevant, and illuminating.

Able counsel found no reason, either prior to or during plea, to lead him to believe that the defendant was incompetent. However counsel did agree with Judge Nunez that an examination would be desirable as an aid in imposing sentence.

Certainly an able and experienced jurist such as Judge Nunez did not then believe the defendant to be incompetent else he would not have accepted the plea. Indeed, the judge had no reason to believe the defendant to be incompetent.

Dr. Messinger's report of July 1968 is also supported and confirmed by the testimony of assistant district attorney Collins and Mr. Tucker.

Under all of the facts and circumstances I find that the defendant was competent on September 13, 1968, when he entered pleas of guilty.

Leaving the issue of mental competency aside, the question remains, was it a knowing and voluntary plea, conforming to necessary legal standards?

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The District Court, in finding that there is no evidence of the entry of a knowing and voluntary plea, cites Boykin v. Alabama, 395 U.S. 238.

In Boykin, the court pointed out that other than the entry of the plea itself the record was silent. The court said, the "judge asked no questions of petitioner concerning his plea and petitioner did not address the court."

> "It was error * * * for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

In the case sub judice there are fourteen pages of colloquy between the judge and the defendant. It amply demonstrates an intelligent and voluntary plea.

In People v. Nixon, 21 N Y 2d 338, our Court of Appeals considered in depth many issues arising on the acceptance of pleas of guilty in varying circumstances.

It held that there is no obligation *in every case* to inquire of a defendant concerning his guilt. There is no uniform mandatory catechism to be followed in accepting a plea. It is left to the reasonable discretion of the court. Competency of counsel is an important factor; freshness or staleness of the complaint is also a factor to be weighed. Is the plea understandable in light of the reasonable alternatives to be contemplated?

In Woodruff v. Mancusi, 41 A D 2d 12, the Boykin issue as to plea standards was raised. The plea pattern was much the same as the case herein but not nearly as extensive. The court held that Boykin was not applicable and clearly distinguishable. To a greater extent is that true here.

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Indeed the United States Court of Appeals, in commenting on this case, referred to the extensive plea examination and indicated no possible violation of the Boykin rule.

The District Court further pointed out that the plea might be defective for failure explicitly to waive the three constitutional rights of jury trial, confrontation, and self-incrimination. The Boykin court merely mentioned that these were three of the rights that were waived when a plea of guilty was entered but made no requirement that they be explicitly waived. Indeed, the reversal was predicated on a completely silent record. People v. Nixon, 21 N Y 2d 338 and Woodruff, 41 A D 2d 12 make no such requirement.

If it be assumed that the defendant was incompetent when he entered his guilty pleas on September 13, 1968, the further question arises as to whether on his date of sentence, in 1969, he then ratified his earlier guilty pleas.

The defendant was sentenced by Mr. Justice Mitchell Schweitzer rather than Justice Nunez, for the reason that in the interim Justice Nunez had been elevated to the Appellate Division, First Department.

The minutes of sentence, in part, reveal the following:

> The Court Clerk: John Suggs. Three cases. 2251 of 1968, 3063 of 68 and 3063A of 68. Is your name John Suggs?
>
> The Defendant: Yes, sir.
>
> The Court Clerk: Is Mr. Jerome Tobin who is present in court your lawyer?
>
> The Defendant: Yes.
>
> The Court Clerk: Now on indictment 3063 of 1968, you are arraigned before this Court for sentence on your plea of guilty to the crime of rape in the first degree. On indictment No. 3063A of 1968, you are

arraigned before this Court for sentence on your plea of guilty to the crime of robbery in the first degree. On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law? You must answer.

The Defendant: Yes, I do.

The Court Clerk: He says he has reasons why judgment should not be pronounced, your Honor. All right, speak.

The Defendant: Judge, at that time I wasn't capable of understanding the case.

The Court: I want the record to be crystal clear that this Court previously had adjourned these sentences until a later date in this month in order to afford his newly appointed assigned appellate division counsel to formalize any application which his client desired to make to withdraw his plea of guilty, is that correct, Mr. Tobin?

Mr. Tobin: Yes.

The Court: Is it also correct that two days ago, on Wednesday of this week you came to me and indicated that your client desired to withdraw such application?

Mr. Tobin: Correct.

The Court: He wanted to abandon such plan and to accept the sentence in this case, is that correct?

Mr. Tobin: Yes.

The Court: Did I further indicate to you that in light of that I would advance the sentence date?

Mr. Tobin: Right, your Honor.

The Court: Do you want a second call to talk to your client?

Mr. Tobin: No, your Honor. He is not changing his plea. He simply wants to explain what happened.

The Court: No. The question which the clerk posed of him is this. Does he have any legal cause to

show why judgment of this court should not now be pronounced upon him.

The Defendant: No.

The Court: Now Mr. Suggs, you understand what I did say with respect to the applications which your lawyer had previously attempted to make on your behalf to withdraw your pleas of guilty, did you understand what I said?

The Defendant: Yes, sir.

The Court: Did you understand I gave him this opportunity to make the application but that he came to me on Wednesday and he requested that I advance your sentence date because you no longer planned to withdraw your pleas of guilty, is that correct?

The Defendant: Yes, that's correct.

The Court: Now, so we will have no misunderstanding either at this time or in the future, do you wish to be sentenced today or do you want an adjournment of your sentence so you can confer again with your lawyer whether or not you want to withdraw your pleas of guilty?

The Defendant: I wish to be sentenced today.

The Court: Then may I assume therefore, that after conferring with your lawyer you no longer plan to withdraw your pleas of guilty, is that correct?

The Defendant: That is correct.

The Court: All right, I am going to ask the clerk to pose the alocution [sic] again.

The Court Clerk: On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law? You must answer.

The Defendant: No.

Appendix K

It should be noted that the defendant, though only seventeen at the time of plea, had prior experience with incarceration as a juvenile.

The District Court says that at time of sentence, though defendant refused an opportunity to withdraw his plea, he was not asked again to admit the commission of the criminal acts. To this date, in no court proceeding has the defendant claimed to be innocent.

When he declined to withdraw his plea, and when sane and when represented by counsel, is it not reasonable to assume that he knew that to which he had pleaded guilty? He was not rushed through the criminal process, as in Boykin.

At time of sentence he still opted for the imposition of sentence on the plea rather than face the possibility of consecutive sentences on multiple B felony counts.

It is true that no magical formula of ratification was adhered to at the time of sentence. I submit that none is needed. Due process is satisfied when reason, logic, and common sense point to the conclusion that justice, according to law, was done.

I hold that the defendant was competent at the time of plea, and ratified that plea at time of sentence.

The defendant's motion is in all respects denied.

This constitutes the opinion, findings and order of the court.

12/3/75

A.J M.
ALOYSIUS J. MELIA

Appendix L

Minutes of Sentencing
June 6, 1969

SUPREME COURT
NEW YORK COUNTY

3063/68

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN SUGGS,

Defendant.

New York, N. Y.
July 3, 1969

Before:

HON. MITCHELL D. SCHWEITZER, Justice

Appearances:

For the Defendant: Jerome Tobin, Esq.

Theodore Custer,
Official Court Reporter

The Court Clerk: John Suggs. Three cases. 2251 of 1968, 3063 of 68 and 3063A of 68. Is your name John Suggs?

The Defendant: Yes, sir.

The Court Clerk: Is Mr. Jerome Tobin who is present in court your lawyer.

The Defendant: Yes.

The Court Clerk: Now on indictment 3063 of 1968 you are arraigned before this Court for sentence on your plea of guilty to the crime of rape in the first degree. On indictment No. 3063A of 1968, you are arraigned before this Court for sentence on your plea of guilty to the crime of robbery in the first degree. On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law. You must answer.

The Defendant: Yes, I do.

The Court Clerk: He says he has reasons why judgment should not be pronounced, your Honor. All right, speak.

The Defendant: Judge, at the time I wasn't capable of understanding the case.

The Court: I want the record to be crystal clear that this Court previously had adjourned these sentences until a later date in this month in order to afford his newly appointed assigned appellate division counsel to formalize any application which his client desired to make to withdraw his plea of guilty, is that correct, Mr. Tobin?

Mr. Tobin: Yes.

The Court: Is it also correct that two days ago, on Wednesday of this week you came to me and indicated that your client desired to withdraw such application?

Mr. Tobin: Correct.

The Court: He wanted to abandon such plan and to accept the sentence in this case, is that correct?

Mr. Tobin: Yes.

The Court: Did I further indicate to you that in light of that I would advance the sentence date?

Mr. Tobin: Right, your Honor.

The Court: Do you want a second call to talk to your client?

Mr. Tobin: No, your Honor. He is not changing his plea. He simply wants to explain what happened.

The Court: No. The question which the clerk posed of him is this. Does he have any legal cause to show why judgment of this court should not now be pronounced upon him.

The Defendant: No.

The Court: Now Mr. Suggs, you understand what I did say with respect to the applications which your lawyer had previously attempted to make on your behalf to withdraw your pleas of guilty, did you understand what I said?

The Defendant: Yes, sir.

The Court: Did you understand I gave him this opportunity to make the application but that he came to me on Wednesday and he requested that I advance your sentence date because you no longer planned to withdraw your pleas of guilty, is that correct?

The Defendant: Yes, that's correct.

The Court: Now, so we will have no misunderstanding either at this time or in the future, do you wish to be sentenced today or do you want an adjournment of your sen-

tence so you can confer again with your lawyer whether or not you want to withdraw your pleas of guilty?

The Defendant: I wish to be sentenced today.

The Court: Then may I assume therefore, that after conferring with your lawyer you no longer plan to withdraw your pleas of guilty, is that correct?

The Defendant: That is correct.

The Court: All right, I am going to ask the clerk to pose the allocution again.

The Court Clerk: On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law? You must answer.

The Defendant: No.

The Court Clerk: Now either you or your attorney or both of you may speak further on your behalf. Do you wish to speak or you wish your lawyer to speak for you?

The Defendant: I wish my lawyer to speak.

Mr. Tobin: Your Honor, the defendant is throwing himself on the mercy of the Court, and I wish to make some remarks, facts that he told me about the facts that I have learned, why there should be mitigating circumstances here. He tells me that when he was five years of age he fell down a flight of stairs and injured his head, and that when he was eight years old he had rheumatic fever and was taken to Knickerbocker Hospital. In 1966 the record shows he spent one month in Bellevue psychiatric ward. That is when he was fifteen years old. He is a product of a broken home; and at the time he was eleven years of age he lived with an aunt, and the aunt worked, and he was pretty much left on his own. He claims that in February 1967 he was told by his teacher or someone in the school in charge not to come

back any more. He didn't come back any more. He afterwards was arrested and sent to West Hampton—was sent to Hampton Farms, he was there for a year and two weeks. Now at West Hampton Farms he became a user of drugs and I wish to say this, your Honor. I have talked to a woman whose son was there, and she told me that drugs are freely brought to Hampton Farms on visiting days by visitors, because when they bring packages there is no examination of the packages. After he got out of West Hampton Farms his criminal career started and as the Court is well aware of he has been sentenced, he was committed to Bellevue in 1968, in July where he spent several months, and at the time the psychiatrist stated he wasn't competent to understand or wasn't properly or mentally equipped to stand trial. However, as your Honor knows, he was re-examined, last month and at that time the psychiatrist said he is able to stand trial. However although he is able to stand trial he has some mental difficulties, paranoia, for one, according to the report, and I ask the Court to take all these facts into consideration, in that although he has sinned against society by reason of circumstances of his youth and his surroundings, and inability to get proper guidance, he fell on the error of his ways. He told me while attending school he did work for an uncle on a painting job, his uncle is a painter and he worked while going to school, and on vacation. But after he came from Hampton Farms he seems to change altogether, and I might add in closing that although I feel he has committed heinous crimes and has sinned against society, there is the thought in my mind that society also has sinned against him, and I ask the Court to consider all these facts in pronouncing sentence on him.

Appendix L

The Court: This defendant pleaded guilty to rape in the first degree under indictment 3063-68 and robbery in the first degree under indictment 3063A-68 to cover two indictments. The pleas to the rape in the first degree, robbery in the first degree covered a series of robberies and rapes. There is nothing to mitigate the offenses themselves in the pre-sentence report, and the only mitigation if one may refer to it is the fact that there is an absence of any criminal record, and the defendant does have a deprived background, and the further fact that at the time of the commission of these crimes he was about seventeen years of age. The defendant is sentenced to an indeterminate term of imprisonment the minimum of which shall be five years and the maximum fifteen years on each conviction, to run concurrently and not consecutively. He is committed to the custody of the New York State Department at Elmira, New York, there to be dealt with in accordance with the laws pertaining to this sentence. I want the record to show that in imposing the minimum sentence of five years I do so because of the nature of the offenses, because of the defendant's negative attitude and his present antisocial orientation. All of these factors combined to convince the Court that he should remain in custody for a minimum of five years prior to meeting the parole board. Remand the defendant. Will you advise him of his right to appeal.

Mr. Tobin: Mr. Suggs, if you wish to appeal you must do so within thirty days from the date of this sentence.

CERTIFIED that the foregoing is a true and accurate transcript of the minutes.

/s/ THEODORE CUSTER

Theodore Custer,
Official Court Reporter

Appendix M

Statute

28 U.S.C. Section 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for a writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

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(7110)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1681

J. EDWIN LAVALLEE, Superintendent,
Clinton State Correctional Institution,

Petitioner,

-against-

JOHN SUGGS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Judson A. Parsons, Jr.
Attorney for Respondent
140 Broadway
New York, New York 10005
(212) 344-8000

Of Counsel:

Christopher B. Kende

In The

SUPREME COURT OF THE UNITED STATES

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The relevant opinions below are set out at petitioner's Appendix A and Appendices E through K.

REASONS FOR DENYING THE WRIT

The facts and legal issues in this case are fully set forth in the detailed and well-reasoned opinion of Judge Oakes which is annexed as Appendix A to the petition. Apparently, petitioner does not question the factual findings made by the court below. Nor does he contest the determination by the district court that respondent was incompetent when he entered his pleas of guilty in state court and that, consequently, those pleas must be regarded as null and void. Petitioner merely seeks to rehash issues which were painstakingly discussed and dealt with in toto below. Even a cursory reading of that decision confirms that no question of sufficient importance is presented to merit the granting of a writ of certiorari.

The long and complex record herein confirms that the facts in this case are unique and are not likely to recur since the key event upon which the petitioner premises his argument (respondent's sentencing on June 3, 1969) occurred only four days after this Court's decision in Boykin v. Alabama, 295 U.S. 238 (1969) and before the state courts had had much experience with its holding. As the court below correctly found, because respondent was incompetent when he pleaded guilty, his post-Boykin sentencing had to comply with all the requirements of Boykin for it to constitute a valid substitute for an invalid plea. (Suggs v. La Vallee, 570 F.2d 1092 (2d Cir. 1978); App. A, pp.47a-54a.) Because of the unique factual posture of this case, it would be wholly inappropriate for this Court to grant certiorari.

CONCLUSION

No questions raised in the petition make Supreme Court review appropriate. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Judson A. Parsons, Jr.
Attorney for Respondent
140 Broadway
New York, New York 10005
(212) 344-8000

Of Counsel:

Christopher B. Kende

June 19, 1978

CERTIFICATION

CHRISTOPHER B. KENDE, a member of the Bar of this Court and of counsel to Judson A. Parsons, Jr. herein, attorney for respondent John Suggs, hereby certifies that all parties required to be served with the instant brief in opposition to the petition for a writ of certiorari, to wit:

Robert M. Morgenthau
District Attorney, New York County
Attorney for petitioner
155 Leonard Street
New York, New York, 10013, and

John Suggs
No. 69-B-0033
Drawer B
Stormville, New York 12585

have been served in accordance with the requirements of Rule 33 of the Rules of this Court.

Christopher B. Kende
CHRISTOPHER B. KENDE